TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 427

FREDERICK W. WADE, PETITIONER,

vs.

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 18, 1948.

CERTIORARI GRANTED JANUARY 10, 1949.

Proceedings in the United States Court of Appeals.

Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit, at the May Term, 1948, of said Court, before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

On the 30th day of September, A. D. 1947, a transcript of the record, pursuant to a notice of appeal, filed in the District Court of the United States for the District of Kansas, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, was appellant, and Frederick W. Wade was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, is in the words and figures following:

United States Circuit Court of Appeals

TENTH CIRCUIT.

No. 3575.

WALTER A. HUNTER, Warden,
United States Penitentiary,
Leavenworth, Kansas, APPELLANT,

vs.

FREDERICK W. WADE, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

FILED SEPTEMBER 30, 1947.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 3575.

WALTER A. HUNTER, Warden,
United States Penitentiary,
Leavenworth, Kansas, APPELLANT,

vs.

FREDERICK W. WADE, APPELLEE.

Statement of Points Relied Upon by the Appellant.

1.

That petitioner, appellee, was not placed in double jeopardy, as contemplated by the Fifth Amendment to the Constitution, in that the first trial, convened at Pfalzfeld, Germany, 27 March, 1945, was not complete, that the tactical situation then and there present due to the combat condition of the United States in a state of war prevented its completion.

2.

That the Court-martial by which appellee was convicted, sentenced and subsequently committed, convened at Bad Neuenahr, Germany, 30 June, 1945, did not lack jurisdiction to try appellee in that such proceeding was in violation of the Fifth Amendment though identical charge and specification had been previously submitted to another Court-martial for trial and had been partially tried but completion thereof prevented because of the tactical condition then and there present due to combat conditions of the United States in a state of war.

3.

That the Trial Court erred in overruling appellant's motion for reconsideration.

JAMES W. WALLACE,
Assistant U. S. Attorney,
Attorney for Appellant.

Filed October 6, 1947.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE ARTHUR J. MELLOTT, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

FREDERICK W. WADE, PETITIONER,

vs.

WALTER A. HUNTER, Warden,
United States Penitentiary,
Leavenworth, Kansas, RESPONDENT.

Civil—No. 980 H. C.

Petition for Writ of Habeas Corpus.

To the Honorable Arthur J. Mellott, Judge of the United States District Court for the District of Kansas:

1 Your petitioner, Frederick W. Wade, respectfully represents:

1. That he is (and was during all the time herein mentioned) a citizen of the United States of America and a citizen of the State of Washington.

2. That Walter A. Hunter is the duly appointed and acting Warden of the United States Penitentiary at Fort Leavenworth, Kansas.

3. That the jurisdiction of the United States District Court is invoked under the Constitution of the United States and the statutes of the United States based upon the fact that petitioner is unconstitutionally and unlawfully deprived of his liberty as hereinafter set out, and that this Court is invested with jurisdiction to entertain this petition pursuant to 28 U.S.C.A., Sec. 451.

4. That petitioner is unjustly and unlawfully deprived of his liberty and detained and imprisoned in the United States Penitentiary at Fort Leavenworth, Kansas, by Walter A. Hunter, warden of said penitentiary, under color of General Court Martial Order No. 2, Headquarters, United States Forces, European Theater, dated January 10, 1946, a copy of which is hereto attached marked Exhibit "A"; and which order is illegal and void for reasons hereafter set out.

5. That petitioner, while serving in the Armed Forces of the United States in Germany, as a member of Company K, 385th Infantry, 76th Infantry Division, he was, on March 16, 1945, arrested and, on March 18, 1945, charged with violation of the 92nd Article of War, the specification being that he did, at Krov, Germany, on or about 14 March, 1945, forcibly and feloniously, against her will, have carnal knowledge of Rosa Glowsky.

6. That petitioner is innocent of the charge.

7. That on March 27, 1945, at Pfalzfeld, Germany, petitioner was tried upon said charge by a duly constituted 76th Infantry Division General Court Martial, that evidence was introduced on behalf of the United States and on behalf of the petitioner, that the United States, petitioner, and the court martial stated that they had nothing further to offer, that the court martial was closed and deliberations commenced, that thereafter, the court martial reopened the Court and instructed the Trial Judge Advocate to produce further evidence and continued the case for the purpose of receiving further evidence.

8. That on April 3, 1945, without the knowledge and consent of petitioner, and without lawful cause or necessity, said charges were withdrawn from said 76th Infantry Division General Court Martial by the appointing authority and referred to the Commanding General, Third United States Army; and on April 18, 1945, without the knowledge and consent of petitioner, referred to the Commanding General, Fifteenth United States Army.

9. That on April 26, 1945, without the knowledge or consent of petitioner, the Commanding General, Fifteenth United States Army, referred said charges to Captain Mil-

ton J. Mehl, MAC, Headquarters, Fifteenth United States Army Trial Judge Advocate of General Court Martial appointed by Paragraph 1, Special Order No. 81, Headquarters, Fifteenth United States Army, dated 21 April, 1945, that by said order or an amended or subsequent order, Richard T. Brewster, Major, Cavalry, O-320117, and Henry T. Dunck, Captain, CAC, O-418573, were appointed Defense Counsel, and were furnished certain papers in the case which did not disclose the prior trial of petitioner; and that said Defense Counsel upon interviewing petitioner, learned for the first time that petitioner had been previously tried by a General Court Martial for the same offense.

10. That petitioner was on June 30, 1945, brought before a Fifteenth United States Army General Court Martial and arraigned upon the identical charge and specification upon which he was tried by the 76th Infantry Division Court Martial.

11. That petitioner at the first opportunity filed and presented his plea in bar of trial on the ground of former jeopardy and in support thereof introduced into evidence the certified record of the former trial; and thereafter said Court Martial lacked jurisdiction to again put petitioner in jeopardy by trial for the same offense.

3 12. That the Trial Judge Advocate, in opposition to said plea in bar, presented a written brief and oral statement containing misleading and erroneous statements of fact and law to the General Court Martial upon the issue of former jeopardy.

13. That the General Court Martial relying upon said misleading and erroneous statements erroneously overruled said plea in bar.

14. That petitioner thereupon pleaded not guilty and evidence was introduced until both prosecution and the defense stated they had no further testimony to offer; final arguments were made; and the Court was closed to deliberate upon its findings.

15. That the Court Martial, by a divided court, rendered a verdict of guilty and sentenced petitioner to be dishon-

orably discharged from the Service, to forfeit all pay all allowances due or to become due, and to be confined to hard labor, at such place as the reviewing authority may direct, for term of his natural life.

16. That petitioner, by written brief prepared by his Defense Counsel, requested that the record be reviewed carefully with a view of correcting a grave injustice and suggested to the reviewing authority, that it might be appropriate to confer with members of the Court Martial and with witnesses, including petitioner. Said brief further stated: "The plea in bar in this case should have been sustained for the reasons set out in argument on the plea, R. 7-12. Without access to law books, it is impossible adequately to present the law. However, in the event the reviewing authority permits the verdict of guilty to stand, we ask permission to associate United States resident counsel to brief and present the law to the proper authority."

17. That the reviewing authority, ex parte, erroneously affirmed the conviction but reduced the sentence from life imprisonment to twenty (20) years imprisonment.

18. That petitioner's Defense Counsel thereafter orally and by written brief presented the issue of former jeopardy to Board of Review No. 4, Branch Office, Judge Advocate General's Department, to which board said case had been referred.

19. That said Board of Review No. 4, a judicial body composed of just and free men, trained in the law, held that the evidence was legally insufficient to support the conviction by reason of former jeopardy.

4 20. That thereafter the Assistant Judge Advocate General, European Theater, arbitrarily and capriciously and without foundation in fact or law and without the knowledge of petitioner or Defense Counsel and without giving petitioner an opportunity to be heard, or represented by counsel, and upon an opinion which the Secretary of War, through his authorized representatives, has refused and still refuses to furnish petitioner though repeatedly requested to do so, dissented from said opinion of Board of Review No. 4.

21. That thereafter the Commanding General, United States Forces, European Theater, on January 10, 1946, and, petitioner states on belief, without consideration of the record or the law, or the opinion of the Board of Review No. 4, and without the knowledge of petitioner or his Defense Counsel (prior to the issuance of the order) and without giving petitioner an opportunity to be heard or represented by counsel, and without foundation in fact or law, sustained the dissent of the Assistant Judge Advocate General and issued general court martial order No. 2, heretofore referred to in Paragraph 4.

22. That petitioner upon learning of the action of the Commanding General, United States Forces, European Theater and the action of the Board of Review No. 4 and the action of the Branch Judge Advocate General, appealed to the Secretary of War to exercise the power and duty vested in him by law to correct the manifest injustice done to petitioner, and release him from unlawful custody and restraint, but that the Secretary of War has failed and refused to act and failed and refused to furnish petitioner with the opinions in his case.

23. Petitioner states that he was furnished an incomplete copy of the record of trial; that he does not have a complete record because of the omissions resulting from the actions and failure to furnish a complete record on the part of the Secretary of War and the Commanding General Fifteenth United States Army and their representatives.

24. Petitioner further shows that his detention and imprisonment, as aforesaid, is illegal and void in this, to-wit:

A. That the Fifteenth Army General Court Martial was without jurisdiction by reason of former jeopardy to try the petitioner and that its finding and sentence were a nullity.

B. That petitioner was tried twice for the same offense in violation of the Constitution of the United States and more particularly the Fifth Amendment thereof and in violation of the laws of the United States and more particularly the Fortieth Article of War (10 U.S.C.A., Sec. 1511).

C. That the Court Martial Order, Headquarters Fifteenth Army, confirming the finding of guilty and confirming the sentence as modified was illegal and void for lack of jurisdiction.

D. That the action of the Branch Judge Advocate General, European Theater, in dissenting from the opinion of Board of Review No. 4 was arbitrary, capricious and illegal and violated petitioner's constitutional right to assistance of counsel in his defense.

E. That the action of the Commanding General, European Theater, in confirming the Court Martial Order Headquarters Fifteenth Army, was void for want of jurisdiction and was the result of arbitrary, capricious and unconstitutional acts in that petitioner was denied the assistance of counsel in the proceedings before said Commanding General.

F. That Court Martial Order No. 2, Headquarters United States Forces, European Theater, dated January 10, 1946, was illegal and void for want of jurisdiction by reason of double jeopardy.

Wherefore, to be relieved of said unlawful detention and imprisonment, your petitioner prays that Writ of Habeas Corpus directed to the said Walter A. Hunter, Warden of the United States Penitentiary at Leavenworth, Kansas, may issue in his behalf, so that your petitioner may be forthwith brought before this Court to do, submit to, and receive what the law may direct.

6

R. T. BREWSTER,

N. E. SNYDER.

Affidavit.

State of Kansas, ss:

Frederick W. Wade, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him, that he has read the same and knows

the content thereof; and the said statements are true as he verily believes.

FREDERICK W. WADE.

Sworn to by said Frederick W. Wade on this 3rd day of September, 1946.

C. H. LOONEY,
Associate Warden Authorized by Act of February 11, 1938, to administer oaths.

Filed September 6, 1946.

Exhibit A.

9 Restricted.

63023 20 yrs. Carnal Knowledge.

Headquarters U. S. Forces, European Theater.

General Court-Martial Order No. 2 10 January, 1946.

Before a general court-martial which convened at Bad Neuenahr, Germany, on 30 June and 1 July, 1945, pursuant to paragraph 1, Special Orders No. 143, Headquarters Fifteenth United States Army, 23 June, 1945, as amended by paragraph 1, Special Orders No. 146, Headquarters Fifteenth United States Army, 26 June, 1945, was arraigned and tried:

Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry.

Charge: Violation of the 92nd Article of War.

Specification: In that Private First Class Frederick W. Wade, Company K, 385th Infantry, did, at Krov, Germany, on or about 14 March, 1945, forcibly and feloniously, against her will, have carnal knowledge of Rosa Glowsky.

Pleas.

To the Specification and the Charge: Not guilty.

Findings.

Of the Specification and the Charge: Guilty.

Sentence.

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. (Two previous convictions considered.)

The sentence was adjudged on 1 July, 1945.

The action of the reviewing authority is:

"Headquarters Fifteenth U. S. Army, Office of the Commanding General, APO 408, 24 July, 1945.

In the foregoing case of Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry, the sentence is approved but the period of confinement is reduced to twenty (20) years. The United States Penitentiary, Lewisburg, Pennsylvania, is designated as the place of confinement. Pursuant to Article of War 50½, the order directing the execution of the sentence is withheld.

Restricted.

L. T. GEROW,
10 Lieutenant General, U. S. A. Commanding."

The sentence thereby having been approved by the reviewing authority and the record of trial having been examined by the Board of Review in the Branch Office of the Judge Advocate General with the United States Forces, European Theater, and the Board of Review having substituted its opinion that the record of trial is legally insufficient to support the findings of guilty and the sentence to the Assistant Judge Advocate General in charge of said Branch Office, and the Assistant Judge Advocate General having dissented from the opinion of said Board of Review, and the record of trial, the opinion of the Board of Review and the dissent of said Assistant Judge Advocate General having been submitted to the Commanding General, United States Forces, European Theater, under the third paragraph of Article of War 50½, and the said

Commanding General having considered the record of trial, the opinion of the Board of Review and the dissent of the Assistant Judge Advocate General the following are his orders hereon:

"Headquarters United States Forces, European Theater.

In the foregoing case of Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry, the sentence is hereby confirmed. Article of War 50½ having been complied with said sentence will be duly executed. The United States Penitentiary, Lewisburg, Pennsylvania, is designated as the place of confinement, or elsewhere as the Secretary of War may direct.

JOSEPH T. MCNARNEY,
General, U. S. Army Commanding.

21 December, 1945."

By Command of General McNarney:
11 H. R. BULL,
Major General, GSC, Chief of Staff.

Official: (Official Stamp.)

L. S. OSTRANDER,
Brigadier General, USA, Adjutant General.

Distribution: M

Restricted.

Respondent's Return.

7 Comes now Walter A. Hunter, Warden of the United States Penitentiary at Leavenworth, Kansas, through James W. Wallace, Assistant United States Attorney for the District of Kansas, and, for his answer and return to the petition for writ of habeas corpus filed herein, states to the Court as follows:

1. Respondent denies each and every allegation in petitioner's application contained except as may be hereinafter specifically admitted, modified or explained.

2. Respondent admits petitioner's custody but denies that same is in any manner illegal or unlawful.

3. Further answering, respondent states that petitioner is detained by this respondent as Warden of the United States Penitentiary, Leavenworth, Kansas, under and by virtue of General Court Martial Order No. 2, Headquarters, United States Forces, European Theater, dated 10 January, 1946.

4. Further answering, respondent states that filed herewith, attached hereto, and made a part hereof as though fully rewritten herein, are the following exhibits showing authority for the respondent's detention of the prisoner:

Exhibit A—Photostatic copy of General Court Martial Order No. 2, Headquarters, United States Forces, European Theater, dated 10 January, 1946, establishing that on July 1, 1945, the petitioner, having been found guilty for violation of the Ninety-Second Article of War, was sentenced to be dishonorably discharged of the Service, to forfeit all pay or allowances due or to become due, to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life, which sentence was subsequently approved by the reviewing authority, but the period of confinement was reduced to twenty years, the United States Penitentiary, Lewisburg, Pennsylvania, being designated as the place of confinement.

Exhibit B—Transfer of authority whereby the place of confinement is by the Secretary of War transferred from the United States Penitentiary, Lewisburg, Pennsylvania, to the United States Penitentiary, Leavenworth, Kansas.

8 5. Further answering, respondent states that said exhibits, together with the statements and admissions of the petitioner in his application, all show conclusively that the writ of habeas corpus prayed for in this cause should be denied.

Wherefore, having fully answered, respondent prays that petitioner's application for writ of habeas corpus filed herein be denied and that said cause be dismissed.

JAMES W. WALLACE,
Assistant U. S. Attorney,
Attorney for Respondent.

Filed September 28, 1946.

Opinion.

12 Richard T. Brewster, Esq., of Kansas City, Missouri, and N. E. Snyder, Esq., of Kansas City, Kansas, for the petitioner. Randolph Carpenter, Esq., United States Attorney, Eugene W. Davis, Esq., Assistant United States Attorney and James W. Wallace, Esq., Assistant United States Attorney (Colonel William J. Hughes, Jr., JAGD, and Colonel Franklin Riter, JAGD, were on the brief) for the respondent.

MELLOTT, District Judge: Petitioner, an inmate of the United States Penitentiary at Leavenworth, Kansas, assails, by a petition for a writ of habeas corpus, the legality of his commitment and detention. Copy of the order of a General Court-Martial[1] under which he is held is attached to his petition and to the response of the Warden. Petitioner alleges that the order is illegal and void for several reasons, the chief one urged being that he had been twice put in jeopardy for the same offense in violation of the

[1] The order is dated 10 January, 1946, and indicates that petitioner had been convicted before a general court-martial which convened at Bad Neuenahr, Germany, on 30 June and 1 July, 1945, pursuant to paragraph 1, Special Orders No. 143, Headquarters Fifteenth United States Army, 23 June, 1945, as amended by Paragraph 1, Special Orders No. 146, Headquarters Fifteenth United States Army, 26 June, 1945, on a charge of having carnal knowledge of a German female, on or about 14 March, 1945, forcibly and feloniously, against her will. Sentenced on July 1, 1945, to be dishonorably discharged, to forfeit all pay and allowances and to be confined at hard labor for the term of his natural life, the sentence was approved by the reviewing authority but the period of confinement was reduced to 20 years. The record of trial having been examined by the Board of Review in the Branch Office of The Judge Advocate General with the United States Forces, European Theater, the Board (three members, Judges Advocate, concurring) submitted its opinion to the Assist-

Fifth Amendment to the Constitution and the Fortieth Article of War.

13 There is no controversy between the parties as to the facts. Each specifically adopts the statement of facts set out in the holding of Board of Review No. 4 of the Branch Office of the Judge Advocate General with the European Theater, introduced in evidence in this proceeding. This Court, therefore, specifically finds the facts to be as shown in such holding, summarizing them for present purpose and showing in foot-notes some portions of the record of trial, deemed to be essential to an understanding of the issue to be determined.

Petitioner, then a Private First Class of Company K, 385th Infantry, and Thomas Cooper, a Private First Class in the same company, were arrainged separately and tried together, with their consent, upon charges of violation of the 92nd Article of War, the specification, in each instance, being that the accused, on or about 14 March, 1945, had forcibly and feloniously had carnal knowledge of a different named German female against her will. Cooper was acquitted and petitioner was convicted. Petitioner was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority should direct, for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to 20 years.

When the General Court-Martial, which found petitioner guilty, convened at Bad Neuenahr, Germany, on 30 June, 1945, petitioner interposed a plea in bar on the ground of

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ant Judge Advocate General in charge of the Branch Office that the record of trial was legally insufficient to support the findings of guilty and sentence. The Assistant Judge Advocate General dissented from the opinion of the Board of Review, monumenting his view in an opinion shown in the record of trial. The opinion of the Board of Review and the dissent of the Assistant Judge Advocate General were submitted to the Commanding General, United States Forces, European Theater, under the third paragraph of Article of War 50½ and upon consideration thereof and of the record of trial the sentence was confirmed 21 December, 1945, by command of Joseph T. McNarney, General, U. S. Army, commanding.

former jeopardy; but, at the suggestion of the Court the plea was reserved until arraignment. Upon arraignment the plea in bar was renewed. Extended argument upon the plea in bar ensued and a duly authenticated rec-
14 ord of a former trial of the accused at Pfalzfeld, Germany, 27 March, 1945, by a General Court-Martial appointed by the Commanding General, 76th Infantry Division, was introduced. There is shown in the margin the initial statement of counsel for the defendant made at that time.[2]

There is set out, at this juncture, a paragraph from the opinion of the Board of Review.

"The record of former trial discloses that Wade was tried before a Court of competent jurisdiction upon the Charge and Specification involved here. He was arraigned and issues were joined by his plea to the general issue (Def. Ex. A, pp. 5. 6); the prosecution introduced evidence and rested (Def. Ex. A, pp. 7-22); and the defense introduced evidence and rested (Def. Ex. A, pp. 22-60).

[2] Major Richard T. Brewster, Cavalry, Headquarters 15th United States Army, who has since resumed the practice of law and now appears as counsel for petitioner, and who was counsel for the defendant, Wade, in the Court-Martial proceeding, said: "I would like to set out what the record shows. The record shows that the case against Private First Class Wade was tried; that after the prosecution and the defense rested, the Court stated it wanted no further evidence, the prosecution stated it had no further evidence, the defense stated it had no further evidence and the Court was closed. After deliberating on the case—and I state that when a Court does deliberate on a case, it certainly places in jeopardy the man whose case is being deliberated on—the Court reopened and requested the calling of certain other witnesses. The case was continued for those witnesses and I maintain that that Court and no other Court has the right to sit in judgment upon the cases against Pfc. Wade. It would be a strange thing if other Courts can sit in judgment on the case, not only would it violate the constitutional rights of Pfc. Wade given to him by the Fifth Amendment against twice being placed in jeopardy for the same offense, not only does it violate the plain language of Article of of War 40 but it violates every sense of justice and the due administration of justice because when you shift cases around, you allow time to lag, you allow witnesses to die in action and to disappear and you allow memory to fail. I say that not only on constitutional and legal grounds but on common sense grounds, this case should be barred as the only Court which has jurisdiction is the Court of the 76th Division of which Pfc. Wade was a member. I ask the Court to consider those grounds."

Both the prosecution and the defense then stated they had nothing further to offer, the Court stated it did not desire any witnesses called or recalled, and, after arguments were made, the case was submitted and the Court was closed (Def. Ex. A, p. 60). The Court was opened later and announced that it desired to hear other named witnesses, and continued the case until a date to be fixed by the Trial Judge Advocate (Def. Ex. A, p. 60). Seven days thereafter, on 3 April, 1945, and prior to further action by the Court, the appointing authority withdrew the charges, and directed that no further proceedings be taken by the Court in connection therewith (Pros. Ex. A). On the same day he transmitted the charges and allied papers to the Commanding General, Third United States Army, with a recommendation for trial by general court-martial, stating that the case had been continued because of the unavailability of two witnesses due to illness, and that the tactical situation made the obtainment of the witnesses impracticable and precluded prompt disposition of the case.

15 (Charge Sheet, 4th Ind.). Thereafter, on 18 April, 1945, the Commanding General, Third United States Army, transmitted the charges and allied papers to the Commanding General, Fifteenth United States Army, requesting that he assume court-martial jurisdiction because the civilian witnesses were residents of the territory under his jurisdiction (Charge Sheet, 5th Ind.). The Commanding General, Fifteenth United States Army, in compliance with this request, assumed court-martial jurisdiction; and on 26 April, 1945, referred the case for trial by general court-martial (Charge Sheet, 1st Ind.)."

The documents referred to in the quoted paragraph are in evidence before this Court. They support the statements made by the Board of Review. This opinion will be more understandable if some of them are referred to in more detail. First, then, reference will be made to the "closing" and "opening" of the court-martial. Following the announcement by counsel that "the defense rests" the prosecution announced that it had nothing further to offer and inquired whether the Court wished to have any witnesses called or recalled. This being answered in the negative arguments were made and

"Neither the prosecution nor the defense have anything further to offer, the Court was closed.

"The Court was opened.

"Law Member: The Court desires that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the Court, the parents of this person making the accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The Court will be continued until a later date set by the T. J. A.

"The Court then, at 1700 o'clock, P. M., 27 March, 1945, adjourned to meet at the call of the president."

The withdrawal of the charge and the direction that no further proceedings be taken by the Court, referred to by the Board of Review in the portion of its opinion or statement of facts set out above, are indicated in a communication from Headquarters, 76th Infantry Division, A. P. O. 76, U. S. Army to the Commanding General, Third U. S. Army, A. P. O. 403, shown in the margin.

16 After receipt of the charges and allied papers by the Third United States Army on or about 3 April, 1945, and on or about 18 April, 1945, it, through the Assist-

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"1. The charges and allied papers in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf., are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the Court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time.

"2. The accused has been served with a copy of the charges. The third copy of the supporting papers is in the hands of the defense counsel and the same will be forwarded as soon as they are obtained from him.

"3. The Trial Judge Advocate obtained the name of Mrs. Anni Endt, a neighbor of the alleged victim, and it is believed that she can further identify the accused.

For the Commanding General:"

ant Adjutant General for the Commanding General, transmitted the charges and allied papers to the Commanding General, Fifteenth U. S. Army, A. P. O. 408, copy of this communication being shown in the margin.[1]

The Commanding General, Fifteenth United States Army, in compliance with this request, assumed court-martial jurisdiction, and on 26 April, 1945, referred the case for trial by general court-martial. Before doing so, however, communication was addressed to Commanding General, First Army, advising that Wade was claiming prior trial for same offense and asking that certified record of trial, if any, and copy of withdrawing order be transmitted.

Apparently in conformity with the request—in any event following it in the trial record—a brief of the Trial Judge Advocate on the subject of "Double Jeopardy" was filed. The conclusion of the Trial Judge Advocate, as therein expressed, was that "Private Wade has not been tried on a former occasion for the offense for which he is now being put on trial." This was premised upon essentially the same line of reasoning as that adopted by the Assistant Judge Advocate General in his communication to the Commanding General, United States Forces, European

[1] "1. Transmitted herewith are charges and allied papers in the case of Private First Class Frederick W. Wade, 39208980, Company K, 385th Infantry, charged with rape of a German woman under Article of War 92. The German civilian against whom the crime was committed and other necessary civilian witnesses are residents of territory now under your jurisdiction.

"2. It is impracticable to try this case by court-martial appointed at this headquarters at this time in view of the tactical situation and fact that the location of the incident and places of residence of necessary civilian witnesses are a considerable distance without the boundaries of this command. Standing Operating Procedure No. 35, Military Justice—Continental Operations, published 16 July, 1944, by Headquarters European Theater of Operations, U. S. Army, provides that when practicable the trial of cases involving the peace and quiet of a civil community will be held in the immediate vicinity of the alleged offenses. In order to accelerate the prompt trial of these offenses, it is requested that you assume court-martial jurisdiction in these cases.

"3. The accused is at present in confinement in the Third U. S. Army Stockade, but will be delivered upon request to such place as you may designate.

For the Commanding General:"

Theater (Main) A. P. O. 757, U. S. Army, advising
17 that he did not concur in the holding of the Board of Review that the record of trial was legally insufficient and recommending a contrary holding. The brief of the respondent, filed in this proceeding, espouses the same view.

The question which evolves and as to which several well-trained and reputable members of the bar divide about equally,* is whether petitioner has been twice put in jeopardy for the same offense in violation of the Fifth Amendment to the Constitution. A preliminary issue is whether this Court has any jurisdiction to determine the question in a habeas corpus proceeding. An incidental, although by no means an inconsequential question, is whether the doctrine of "Imperious Necessity" or "Urgent Necessity," authorized the Commanding General of the 76th Infantry Division, in the exercise of his sound discretion, to stop the first trial, withdraw the charges and refer them to the Commanding General of the Third Army for re-trial without hazarding the accused's claim that he had been placed in jeopardy by the proceedings before the 76th Infantry Division Court.

At the outset it may be said that this Court recognizes the limited scope of its inquiry under a petition for a writ of habeas corpus. As learned counsel for the respondent correctly point out upon brief, this Court is not an appellate tribunal sitting in review of court-martial judgments, and it will not arrogate to itself an examination of the record of trial for the purpose of determining whether errors were committed in the reception or rejection of evidence or whether the finding of guilt was sustained by the evidence. Courts-martial are lawful tribunals, with authority to determine cases over which they have jurisdiction; and their proceedings, when confirmed as provided by law, are not to be lightly overturned. But it must be borne in mind that a court-martial is a "creature of statute, and, as a body or tribunal, it must be convened and constituted

*The views of counsel for the petitioner coincide with those of the three Judges Advocate who constituted the Board of Review while the views of the respondent appear to be supported by at least an equal number of lawyers in the Judge Advocate General's Department.

in entire conformity with the provision of the statute or else it is without jurisdiction."[6] The first inquiry, therefore, must be whether the court-martial which com-
18 committed petitioner had jurisdiction to do so.

Inferentially, counsel for the respondent seem to be of the view that this Court is bound by the determination of the court-martial that it had jurisdiction to try the accused and to issue the commitment in question. This seems to be premised upon the assumption that the court-martial's ruling on the question of "double jeopardy" and non-applicability of the Fifth Amendment was a ruling upon a legal issue arising during the trial and therefore may not be inquired into in a collateral proceeding. While the language of some decisions may tend to support that view, this Court is of the opinion that later pronouncements by the Supreme Court authorize it to determine, in a habeas corpus proceeding, whether the petitioner has been twice put in jeopardy for the same offense; for, if the sentence was "beyond the jurisdiction of the Court because it was against an express provision of the Constitution, which bounds and limits all jurisdiction" (Ex parte Hans Nielsen, 131 U.S. 176, 185), it is invalid.

Before passing upon the issue of "double jeopardy" it is appropriate to consider another important question raised by learned counsel for the respondent upon brief. Stated generally it is that one in the military service of his country may not be allowed the protection of the Fifth Amendment. Specifically, it is contended that the petitioner at bar must seek his rights under, and his case

[6] McClaughry v. Deming, 186 U.S.49. Cf. Carter v. Roberts, 177 U.S. 496; Carter v. McClaughry, 183 U.S. 365; Grafton v. United States, 206 U.S. 333; Reaves v. Ainsworth, 219 U.S. 296; French v. Weeks, 259 U.S. 326; Ex parte Reed, 100 U.S. 13; Collins v. McDonald, 258 U.S. 416. Contra Sanford v. Robbins, 115 F. 2d 435.

[7] See, e. g. Ex parte Bigelow, 113 U.S. 328.

[8] Clawens v. Rives, 104 F. 2d 240; Ex parte Hans Nielsen, 131 U.S. 176; United States v. Bell, 163 U.S. 662.

[9] Cf. Rosborough v. Rossell, 150 F. 2d 809; Johnson v. Zerbst, 304 U.S. 458; Bowen v. Johnston, 306 U.S. 19; and Amerine v. Tines, 131 F. 2d 827.

must "be governed exclusively by, the 'double jeopardy' provision of the Fortieth Article of War." The Fifth Amendment provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb."

The Fortieth Article of War is shown in the margin.[10]
19 Under the latter it seems that the pleas "Autrefois acquit" and "Auterfois convict" may be interposed but not the plea of "former jeopardy." Since neither the plea of autrefois acquit nor auterfois convict could be sustained upon the present record, a holding that the Fifth Amendment is not applicable would require discharge of the writ and denial of the petition. No case cited to, or found by, this Court so holds and it is reluctant to be the pioneer in such a decision.

The argument of counsel proceeds substantially as follows: The Congress has the power to provide for trial and punishment of military and naval offenses and has done so, independent of the civil judicial system provided by the Constitution. The Courts have held that the framers of the Constitution meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the Fifth Amendment, i. e., to those who were not involved "in cases arising in the land or naval forces, or in the Militia, when in actual

[10] Title 10 U.S.C.A., Sec 1511. "As to number (article 40). No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

"No authority shall return a record of trial to any court-martial for reconsideration of—

"(a) An acquital; or

"(b) A finding of not guilty of any specification; or

"(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or

"(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

"And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited. (June 4, 1920, c. 227, subchapter 11, Sec. 1, 41 Stat. 795.)

service in time of War or public danger."[11] By analogy, if one in the military forces may be denied the right of trial by jury notwithstanding the Sixth Amendment, he may also be denied the protection of the Fifth Amendment against being twice put in jeopardy for the same offense. While some of the early decisions contained dicta which might be interpreted as construed by respondent, the Supreme Court, in the judgment of this Court, has not specifically so held. On the contrary, in a much later case, also discussed by counsel upon brief,[12] it is pointed out that while Congress, "by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army * * * those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense." This language is characterized by counsel for respondent as obiter dictum, inasmuch as the discussion in which it is contained seems to be broader than the issue under consideration; but while the question now raised is not precisely the same as the one before the Court in the cited case, this Court is constrained to accept the quoted statement as a correct exposition of the principle of law to be applied.

It is of interest to note that the Board of Review took essentially the same view of the question as this Court has indicated it takes. It held that the intendment of the two inhibitions against double jeopardy—i. e., the Fifth Amendment and Article of War No. Forty—was essentially the same, pointing out that the Fifth Amendment "is a limitation on courts-martial, as they, like other Courts deriving from an exercise of the Federal power, are subject to the restrictions of the Bill of Rights except insofar as special constitutional provision for them is made." The authorities cited[13] support the conclusion reached.

[11] Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123.

[12] Grafton v. United States, 206 U.S. 333.

[13] Sanford v. Robbins, 115 F. 2d 435, 438; United States ex rel. Innes v. Hiatt, 141 F. 2d 664; Ex parte Quirin, 317 U.S. 1. Cf. Schita v. King, 133 F. 2d 283; Shapiro v. United States, 69 F. Supp. 205.

Respondent contends that the portion of Article of War Forty reading: "* * * but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case" is definitive of "jeopardy" in all cases triable by courts-martial. This Court is constrained to hold, as did the majority of Board of Review No. 4, that such definition is applicable only to those cases in which the accused has been found guilty, and that the purpose of such provision is to authorize the reviewing or confirming authority to remand a case for a new trial where
21 the finding of guilty is not approved. The context of Article Forty indicates the provision quoted is but a statement of principles protecting the accused rather than an enlargement of the power of the reviewing or confirming authority to a point of conflict with the protection of the double jeopardy clause of the Fifth Amendment. A construction of a statute which does not conflict with the Constitution is to be preferred over one which conflicts with the Constitution.

Has petitioner been twice placed in jeopardy for the same offense within the purview of the Fifth Amendment? "The general rule is that a person is not in jeopardy until he has been arraigned on a valid indictment or information, has pleaded, and a jury has been impaneled and sworn; and where a case is tried to a Court without a jury, jeopardy begins after accused has been indicted and arraigned, has pleaded and the Court has begun to hear evidence." McCarthy v. Zerbst, Warden, 85 F. 2d 640, 642. The prohibition against double jeopardy is not directed to the peril of a second punishment, but to a second trial for the same offense. Kepner v. U. S., 195 U.S. 100, 130.

The Board of Review expressed the opinion that the burden of pleading and proving former jeopardy rested upon petitioner and, in the event of his failure so to do, waiver would follow. The record clearly indicates, however, that no waiver occurred, the plea having been properly made and argued at length. That it should have been sustained seems to be clear, tested by the rule referred to

in the preceding paragraph. Whether the refusal of the military authorities to release upon the ground of double jeopardy may be passed upon in a habeas corpus proceeding has already been discussed. Being of the opinion that it may, the Court now holds that petitioner was placed in jeopardy by the court-martial convened by the 76th Infantry Division; that his subsequent trial and conviction by the general court-martial convened by the 15th United States Army at Bad Neuenahr, Germany, placed him in double jeopardy; and that the last-mentionad trial and conviction are void for lack of jurisdiction unless the doctrine of "Imperious Necessity" or "Urgent Necessity," yet to be considered, justifies a different conclusion.

22 It is significant that the view of this Court, which is essentially the same as that expressed by the Board of Review in its opinion, was also shared by the Assistant Judge Advocate General (who dissented from the conclusion of the Board of Review) as expressed in his communication to the Commanding General, United States Forces, European Theater. Therein he said:

"I am in accord with the Board of Review in its analysis of the principles of law applicable to the plea of former jeopardy and subscribe to the doctrine expressed in the opinion that in the trial of cases before general courts-martial, jeopardy within the meaning of the relevant provision of the Fifth Amendment to the Federal Constitution may attach prior to findings by the Court and approval of the sentence by the reviewing authority. I further agree with the Board of Review that the 40th Article of War must be read in the light of the Fifth Amendment and the adjudications of the Federal Courts with respect to the 'double jeopardy' clause therof."

His difference with the Board of Review was stated to "resolve about the question as to the operative effect" and applicability of the principles discussed in the opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of Cornero v. United States, 48 F. 2d 69.

In Cornero v. United States, supra, a jury had been impaneled to try defendants charged with a conspiracy to violate the National Prohibition Act. The prosecuting at-

torney having announced that he was unable to proceed because of the absence of necessary witnesses, the jury was discharged. The Court held that jeopardy had attached and that the doctrine of imperious necessity did not extend to the absence of witnesses.

The Board of Review, relying upon the statement made in the communication from Headquarters, 76th Infantry Division to the Commanding General of the Third Army (see footnote 3):

"* * * The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the Court continued the case so that their testimony could be obtained. * * *"

applied the rationale of the Cornero case, pointing out that while situations might arise in the administration of military justice, calling for the exercise of the doctrine of imperious necessity, the absence of witnesses
23 alone "does not sanction the exercise of the doctrine." The Assistant Judge Advocate General took the view, however, "that the situation disclosed in the instant case is, in the application of the doctrine to the Military Courts, well within the description of 'urgent circumstances,' notwithstanding the generally accepted limitation of the Civil Courts." He placed substantial reliance upon the sentence in the communication immediately following that set out above (see footnote 3), reading:

"Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time."

Counsel for respondent, upon brief, urge that the sentence last quoted "is a finding by the Commanding General of the 76th Infantry Division that a military situation existed which required the discontinuance of the trial before the Court appointed by him and the transfer of the cause to a jurisdiction where military conditions permitted the production of the witnesses." This Court does not so construe the language used, especially when

considered, as it should be, in its context. In this connection the record with reference to the closing and reopening of the case, shown elsewhere in this opinion, should likewise be considered.

It would serve no good purpose to discuss at length the doctrine of "imperious" or "urgent" necessity. The Board of Review defines it as "a sudden and overwhelming emergency, uncontrollable and unforseeable, infecting the judicial process and rendering a fair and impartial trial impossible. It does not mean expediency." The Board's characterization of the term as

"* * * an illusive and expansive doctrine, not susceptible of precise definition because it is designed to apply to emergent situations * * *."

is approved by the Assistant Judge Advocate General in his communication to the Commanding General as is also its statement to the effect that "the power should be exercised with caution, and * * * be limited to the most urgent circumstances"—"a real emergency which is diligence and care could not have been averted." Cf. United States v. Perez, 9 Wheat. 579. The list of instances in which it is to be applied, given in the opinion of the Board of Review—where a jury is unable to agree; misconduct tainting the panel; inflammatory press releases corrupting the jury; relationship of a juror to the accused; incapacity of a juror, etc.—is illustrative only. Other situations come to mind; and if the record in the case at bar indicated that the "tactical situation" was the motivating reason for discharging the first court-martial, this Court would not hesitate to hold that the doctrine is applicable. As previously pointed out, however, the absence of witnesses, rather than an emergency due to the military situation, seems to have been the reason for the withdrawal of the case from the court-martial which first heard it.

24

This Court is of the opinion and now holds that petitioner is illegally detained and restrained of his liberty by the respondent herein. Order releasing him from custody is accordingly being entered. Inasmuch as the order is reviewable (Title 28, U.S.C.A., Sec. 463), a good and

sufficient bond, conditioned according to law, in the amount of Two Thousand Five Hundred ($2,500.00) Dollars, to be approved by the clerk of this Court, is being made a condition precedent to petitioner's release. (Rule 45. Rules of the Supreme Court.)

Filed May 9, 1947.

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25 [Judgment.]

Good cause appearing therefore and for the reasons set out in an opinion this date entered herein, it is now by the Court found and determined that petitioner is illegally detained and restrained of his liberty by the respondent above named. It is therefore by the Court

Ordered, that petitioner, forthwith and upon the filing with, and approval by, the Clerk of this Court of a good and sufficient bond, conditioned according to law, in the amount of Two Thousand Five Hundred ($2,500.00) Dollars, be released from custody. (Title 28 U.S.C.A. § 463; Rule 45, Rules of the Supreme Court.) It is further

Ordered, that the Certificate of the Clerk of this Court that the bond required has been given is a condition precedent to the release of the petitioner from custody; but failure to give such bond shall not affect the determination heretofore made. The Court specifically reserves jurisdiction to make such further orders in the cause as may be meet and proper.

Dated at Kansas City, this 9th day of May, 1947.

ARTHUR J. MELLOTT, District Judge.

Filed May 9, 1947.

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26 Respondent's Motion for Reconsideration.

Now comes the Respondent herein and respectfully moves the Court for reconsideration of its decision and opinion heretofore entered in this cause on May 9, 1947, for the following reasons:

1. Respondent does not request reargument of any of the legal issues set forth in the opinion. This motion for reconsideration is addressed solely to that portion of the Court's opinion which reads as follows:

"* * * the absence of witnesses, rather than an emergency due to the military situation, seems to have been the reason for the withdrawal of the case from the court-martial which first heard it."

2. Respondent is prepared to prove by reference to the historical facts showing the movement of the Headquarters of the three units involved—the 76th Infantry Division, the Third United States Army and the Fifteenth United States Army—that it was the tactical situations arising out of the concluding six weeks of hostilities in the European Theater of Operations against the armies of the German Reich which were in fact responsible for the action taken here.

3. Respondent is prepared to show the movement of the Headquarters of the 76th Infantry Division from Pfalzfeld, in the Rhineland, a place near the scene of the alleged offense for which petitioner was tried by the 76th Infantry Division Court to Limbach, Saxony, many miles away from the scene of the offense. Respondent is prepared to show how, from March 20 to April 24, 1945, in connection with the pursuit of the German armies the Headquarters of the 76th Infantry Division was at no less than fifteen different places, in four separate provinces of Germany.

27 4. Respondent is likewise prepared to prove the location of the respective Headquarters of the Third and Fifteenth United States Armies during the same period. Such proof will demonstrate that, at the time the charges against petitioner were transferred from the 76th Infantry Division to the Third United States Army, the latter unit's Headquarters were in the vicinity of the scene of the offense; and similarly, that at the time of the second transfer by the Third United States Army to the Fifteenth United States Army, the Headquarters of the last mentioned organization had moved to the vicinity of the place of the offense. Respondent further is prepared to

show that the critical witnesses, for whose testimony the first court-martial trial was adjourned, were finally located at a place which was then under the control of said Fifteenth United States Army.

5. These witnesses would have been produced, not as in the United States pursuant to a subpoena supported by statutory authority (See Article of War 23; U.S.C. 1594) and not as in England by virtue of an Order in Council, but simply as a result of the power of the United States Military Commander, over the inhabitants of conquered territory. Respondent will show, by reference to the progress of the Third United States Army during the last weeks of the war and particularly at the time when the case was transferred from that Army to the Fifteenth United States Army, that the place of residence of the witnesses had passed beyond the control of the 76th Infantry Division and the Third United States Army and was under the control of the Fifteenth United States Army.

6. Respondent believes that this evidence will clearly demonstrate that the term "tactical situation" as used by the Commanding General of the 76th Infantry Division and of the Third United States Army was not a mere form of words designed to disguise a matter of convenience but in truth and in fact accurately described the fluid military situation which marked the closing days of the war in Germany. Consequently Respondent asserts with confidence that the action taken was consistent
28 with the constitutional principles of double jeopardy as applied by Congress to Military Law and the practical necessities of military justice in the provisions of the 40th Article of War.

7. Attached hereto and by this reference incorporated herein is a map showing the respective movements of the 76th Infantry Division, Third United States Army and the Fifteenth United States Army and also indicating the tactical situations which prevailed with respect to said commands during the period when the charges against petitioner were withdrawn from the jurisdiction of the 76th Infantry Division Court and were transferred

to the Court of the Fifteenth United States Army through the channel of the Third United States Army.

8. In its opinion this Court said:

"* * * If the record in the case at bar indicates that the 'tactical situation' was the motivating reason for discharging the first court-martial, this Court would not hesitate to hold that the doctrine [of imperious necessity] is applicable."

As indicated above, the Respondent is convinced that the proof will show that the tactical situation was, in fact, the motivating reason for withdrawing the charges from the first court-martial.

Wherefore Respondent prays that the Honorable Court reconsider its decision and opinion herein and make and enter its orders fixing the time and place whereat Respondent may submit additional evidence in proof of the facts hereinabove alleged with opportunity afforded Petitioner to submit countervailing evidence if he may desire.

Respectfully submitted,

RANDOLPH CARPENTER,
United States Attorney,
District of Kansas, Topeka, Kansas.

JAMES W. WALLACE,
Assistant U. S. Attorney,
District of Kansas. Topeka, Kansas.

EUGENE W. DAVIS,
Assistant U. S. Attorney,
District of Kansas, Topeka, Kansas.

Attorneys for Respondent.

Of Counsel:
WILLIAM J. HUGHES, JR.,
Colonel, JAGD, U. S. Army.

FRANKLIN RITER,
Colonel, JAGD, U. S. Army.

Filed June 12, 1947.

Note:

Page 30, a large military map showing positions and movements, is not satisfactorily reproducible.

31 Journal Entry of Order on Respondent's Motion to Reconsider.

Now on this 10th day of July, 1947, at Kansas City, Kansas, this proceeding comes regularly on for hearing on respondent's motion for reconsideration of the decision and opinion entered in this proceeding on May 9, 1947.

Petitioner appears by R. T. Brewster and N. E. Snyder, his attorneys of record.

Respondent appears by James W. Wallace, Assistant U. S. Attorney, one of his attorneys of record.

Thereupon, the arguments of counsel are heard and considered; and the Court, having examined the record, and being well and fully advised in the premises, finds that respondent's motion for reconsideration is essentially a motion for a new trial; the motion was not filed within ten days after the final judgment and decision; and the Court is without jurisdiction to entertain the motion. It is therefore

Ordered that respondent's motion for reconsideration be and it hereby is denied.

ARTHUR J. MELLOTT, U. S. District Judge.

O. K.
R. T. BREWSTER,
N. E. SNYDER,
Attorneys for Petitioner.

JAMES W. WALLACE,
Assistant U. S. Attorney
One of Counsel for Respondent.

Filed July 11, 1947.

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32 Notice of Appeal.

Notice is hereby given that the respondent, Walter A. Hunter, Warden of the United States Penitentiary, Leav-

enworth, Kansas, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the opinion and judgment entered in this cause on May 9, 1947, and the opinion and judgment entered on the motion for reconsideration on July 10, 1947.

JAMES W. WALLACE,
Assistant U. S. Attorney,
Attorney for Respondent.

Copy of above Notice of Appeal mailed to: Richard T. Brewster, Attorney at Law, 907 Federal Reserve Bank Building, Kansas City, Missouri, and Mr. Nona E. Snyder, Attorney at Law, 210 Brotherhood Building, Kansas City, Kansas, this 25th day of July, 1947.

(Seal.) HARRY M. WASHINGTON, Clerk.

By MARY E. CHAPIN, Deputy Clerk.

Filed July 25, 1947.

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120 Order Enlarging Time.

And now on this 29th day of August, 1947, comes on for hearing the motion of the respondent for an order enlarging the time in which to file and docket the record on appeal in this the above-captioned and numbered cause. The Court being well and truly advised finds that good cause appears therefor and that said motion should be sustained.

It is therefore ordered that the respondent, Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, be and is hereby allowed thirty days additional time in which to file and docket his record on appeal in this cause.

WALTER A. HUXMAN, Judge.

Filed August 29, 1947.

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33 Transcript of Proceedings, September 28, 1946.

Hon. Arthur J. Mellott, Judge, Presiding.

Appearances: R. T. Brewster and N. E. Synder, Appeared for Petitioner. Eugene W. Davis and James W. Wallace, Appeared for Respondent.

Be it remembered, on the 28th day of September, A.D. 1946, the above matter coming on for hearing before the Honorable Arthur J. Mellott, Judge of the District Court of the United States for the District of Kansas, and the parties appearing in person and or by counsel, as hereinabove set forth, the following proceedings were had:

34 Mr. Snyder: In this case, if the Court please, the petitioner is ready.

Mr. Wallace: If the Court please, I would like to make some comment.

The Court: We will wait until the prisoner is brought in if he is here. You may proceed, gentlemen. State your appearances for the record.

Mr. Snyder: If the Court please, the appearances on behalf of the petitioner Wade are Mr. R. T. Brewster and N. E. Synder.

The Court: Mr. Brewster I take it is—

Mr. Snyder (Interrupting): Mr. Brewster, if the Court please, is a regularly and duly admitted practicing attorney of the State of Missouri. I do not believe he has been admitted to practice in this Court but I would like, for the purpose of this case, if the Court please, to move you now that he be admitted since he has associated with many resident local counsel.

The Court: He will be permitted to appear in this case.

Mr. Wallace: Appearances for Walter A. Hunter, Warden, respondent in this case are James W. Wallace, Assistant United States District Attorney for the District of Kansas, and Eugene W. Davis, Assistant United States Attorney for the District of Kansas.

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35 The Court: You may state your case for the petitioner.

Mr. Wallace: If the Court please, there is one comment I think I should make now if you will permit me.

The Court: Very well.

Mr. Wallace: This case, to adequately prepare the defense for this case, it was necessary that there be secured from the Judge Advocate's Division in Washington, through the Attorney General, the proceedings of the court-martial trial and the opinion of the Board of Review. At the time the request was made for such proceedings which as yet have not yet been received by our office, through the courtesy of counsel for the petitioner, our office has been supplied on yesterday, with the copy of the proceedings as furnished the petitioner, and what appears to be the opinion of the Board of Review. Obviously on such short notice we could not present this case as it should be, particularly the brief. I don't want the Court to feel that we, in any way, want to delay the proceedings in this case. I would like though, that on the conclusion of the case, that the respondent have time in which to submit appropriate briefs and the securing of testimony if it appears after the presentation of the petitioner's case, such are necessary.

The Court: We will hear you at the conclusion of the evidence. If such a request is made it will probably be granted.

36 Mr. Snyder: If the Court please, I might state at the outset that we have no disposition to force them unduly into trial. Your Honor knows the record on that—from the record before you the date on which the petition was filed, and as they stated we furnished a copy of the record of trial and a copy of the opinion of the Board of Review No. 4 to Mr. Wallace. Mr. Brewster had tried unsuccessfully until about two days ago to obtain a copy of the opinion of the Board of Review and as soon as he got one he sent one to Mr. Wallace.

Mr. Wallace: That is correct.

Mr. Snyder: This action, if the Court please, is one in habeas corpus to test the validity of the proceedings brought against the petitioner, Wade, by which he is incarcerated now in the Federal Penitentiary at Leavenworth under a general court-martial order No. 2 dated January 10, 1946, which is set out and attached as an Exhibit to the petition and which also is attached as an Exhibit to the response.

Mr. Wallace: Correct.

Mr. Snyder: It shows that he is now incarcerated, serving a sentence, to be dishonorably discharged from the service of the United States Army, to forfeit all pay and allowances due or to become due, and to be confined at hard labor or at such place as the reviewing authority may direct for the term of his natural life.

37 Now, that sentence later was reduced and was finally confirmed is the same except that the sentence is 20 years. He was convicted on the charge of violation of the 92nd Article of War, which is the one relating to rape and it is the charge of committing the crime of rape at Krov, Germany on or about March 14, 1945 against one Rosa Glowsky, a German natural. Now, the principal question for Your Honor's determination here is whether or not the court-martial which made the finding of guilt and which imposed the sentence had jurisdiction to do so. It is the petitioner's contention that that Court lacked sufficient jurisdiction for the reason that he previously had been tried for the identical offense before another court-martial. The evidence will show, if the Court please, that while serving in the Armed Forces in Germany as a member of Company "K" of the 385th Infantry, this petitioner was arrested on March 16, 1945, charged with violation of the 92nd Article of War, the specification being that he did at Krov, Germany, on March 14, forcibly and feloniously and against her will, have carnal knowledge of Rosa Glowsky. On March 27th at Pfalzfeld, Germany, a duly constituted court-martial of the 76th Infantry Division tried this charge and this specification. There was a complete trial. The President of the court-martial asked the prosecution at the termi-

nation of the trial if there was any further evidence to be offered. They stated they had no evidence, no further evidence to offer. The same question was asked of counsel for the defense and a similar response was made.

38 Arguments were then made to the court-martial and at the conclusion of those arguments the President of the Court then announced that the Court was closed, that we will show, if Your Honor please, is tantamount to submission of the case to a jury where it is being tried in one of our Courts here in the United States. No decision or no finding was made upon the specifications or charges but at a later time the Court was reopened and the President announced that additional evidence was desired specifying particularly the parents of the complainant among others, and announced that the case would be continued until a date to be set by the Trial Judge Advocate General and again proceedings were stopped. Thereafter, and on or about April 3, 1945, without the knowledge or consent of this petitioner, or without his having anything to do or say about it or without his counsel knowing or having anything to do or say about it, the charges were withdrawn from that court-martial. The charges were then, after withdrawal from that court-martial and after the breaking up of that particular Court, were then referred to the Third Army for trial. By the Third Army these same identical charges were then referred to the Fifteenth Army for trial and all of this was done without the knowledge or consent of the petitioner.

On June 30, 1945, this particular trial which we state and say was held without jurisdiction of the court-martial, was commenced. The defense counsel at that
39 time was Major Brewster, who is now associate counsel in this case and seated here in the court room. At the conclusion of the case the Court was closed in this second trial and returned a verdict—a finding of guilty of the charge and specification. That is the sentence under which he is now serving.

Now, at the inception of the second trial, if the Court please, defense counsel and I think there will be no ques-

tion about that, before the commencement of the trial raised the question of being twice in jeopardy in violation of the 5th Amendment to the Constitution of the United States. He was told that that plea would be taken at the time for special pleas. He made the reply that he wanted to protest against being twice placed in jeopardy at the earliest inception and before plea and again the same objection and protest was raised at the time the court-martial in the second trial called for any special plea which there might be.

Following this conviction and finding of guilt on the charge and the specification, if the Court please, by the second court-martial, the review provided by the Articles of War was had by the next highest in authority there at the time and place. The result of the first review was a confirmation of the findings of guilt of the charges and specifications but a reduction of the sentence to 20 years. Thereafter, in the regular course of proceedings this finding and conviction came on for review before Board of Review No. 4 in the European Theater. A Board of Review which was composed of three members of the Judge Advocate General's Department. They filed an opinion dated November 7, 1945, in which they held a record of trial legally insufficient to sustain the charges. There was no dissent by any of the three members of the Board of Review but under the system—Army system of court-martials it is permissible for a Branch Judge Advocate General to write a dissenting opinion from a holding of such a Board of Review and the Branch Judge Advocate General did write such an opinion in this case. We have photostatic copies, if the Court please, of that opinion which we obtained only two or three days ago which Major Brewster obtained. They will be offered in evidence.

Under the provisions of the Articles of War when such a dissenting opinion is written, the case then goes for review to the commanding authority of the theater in time of war or, as I understand it, to the President of the United States if not in time of war, is that correct?

Mr. Brewster: Essentially.

Mr. Wallace: That is correct.

Mr. Snyder: The Commanding General of the theater adopted or followed the dissent of the Branch Judge Advocate General, General Joseph T. McNarney was the Commanding General and that is the order, General Court-Martial Order No. 2 under which this petitioner is now being held. I will not go to the trouble of
41 reading the sentence on that was imposed. It is very short. It simply confirmed it, fixed the time of imprisonment at 20 years and ordered him confined at the penitentiary at Lewisburg, Pennsylvania, or elsewhere as the Secretary of War might direct. Following that, if the Court please, efforts were made to obtain and procure a further review and all of those efforts were unsuccessful.

Major Brewster will—has letters here which I think we will have no difficulty with counsel agreeing that they bear the stamp and letters of the War Department, that there is no further relief available to the man through the Army channels of the Court Martial.

Mr. Wallace: No, we wouldn't agree to that.

Mr. Snyder: We will see what we can agree on—the letters when you get them, then.

Mr. Wallace: All right.

Mr. Snyder: That by—the case has been wonderfully developed, if Your Honor please, in this opinion by the Board of Review No. 4. In that opinion will be found the citations of cases which we believe are those that govern the principles of law applicable in this case. It seems to be conceded in this opinion of the Branch—of the Board of Review No. 4 that first, there is no question that the Fifth Amendment insofar as the former jeopardy clause is concerned, is applicable to court-martial and in the second place it seems to be clearly conceded in that
42 opinion that there has been no waiver of his right not to be twice placed in jeopardy for the same offense and so the issue has become narrowed to the question of whether or not under the doctrine that has been labeled imperious necessity, charges may be withdrawn

from a court-martial after a full and complete trial and referred to another division—district, another division —referred to another Army and from that Army to yet another Army for general court-martial without violating the provisions of the *15th* Amendment prohibiting any person—any citizen of the United States from twice being placed in jeopardy for the same offense. Of course we think the burden is on them to show that.

I do not know how much evidence it will be necessary for us to introduce. I feel confident that the able United States Assistant Attorney will readily agree to whatever documents we have here which are properly identified and set up. I am referring specifically to the record of trial which was furnished to the petitioner Wade under the Army Court-Martial Rules, the original of which we have here, and a copy of which we have furnished to Mr. Wallace, and the opinion of the Board of Review furnished to us by the War Department of the United States.

I believe when we have shown Your Honor that state of facts on the record and these exhibits are offered and identified and admitted, there can be no possible doubt or question in your mind that the petitioner, Wade, is entitled to be discharged from the unlawful confinement which he is now suffering by virtue of the void order attached to the complaint in this case.

43

The Court: Do you desire to state your case at this time on behalf of the respondent?

Mr. Wallace: If the Court please, I would like to say without admitting the contentions just advanced by petitioner's counsel, that his belief that the statement of the facts in this case have been well stated. I am unable to admit that they are entirely correct because of the lack of the authenticated copy of the Board of Appeal. What I have are just what purports to be copies. I would like to say this, that the contentions of the respondent will be that the petitioner was not placed in jeopardy the second time by the second court-martial by virtue of three rea-

sons: The first one which will be subsequently developed, that having raised—once raised the question of double jeopardy at the outset of the second trial and the question having been adjudicated by that Court and passed upon and proceeded with, as far as court-martials are concerned the question cannot again be raised here. Secondly, that through the doctrine of imperious necessity just suggested by Mr. Snyder, that the facts present in this case were such that is the—there was such a state of combat and activity in that locality that the appointing authority had the right to avail himself of that doctrine and withdraw those charges from the first Court and submit them to the second, and thirdly, that Article of War 40, 44 which is the Article of War dealing with the double jeopardy, and the Fifth Amendment, provides that a trial shall not be considered to be complete until such time as the reviewing authority shall have passed upon it and in the instant case while the case had proceeded sufficiently far that the Court had closed, he had not yet processed it to the reviewing authority to whom it must have gone had there been a sentence, and consequently he was appointed the apointing authority to withdraw.

I believe that is all at this time.

The Court: Call your first witness.

Mr. Snyder: If the Court please, we have here—Mr. Wallace, I don't know whether you have seen this or not. I would like to have you examine it. Will you mark this for identification, please, the Petitioner's Exhibit No. 1.

(Document marked Petitioner's Exhibit No. 1.)

Mr. Snyder (Continuing): —which we are offering for identification and will later offer in evidence as the complete record of both trials which was furnished to the petitioner—as they were furnished to him but which are incomplete in that certain exhibits were not attached to them. Mr. Wallace, will you examine—

Mr. Wallace (Interrupting): The respondent has no objection to it being introduced as to the record of trial

which was furnished the petitioner at the conclusion of the court-martial.

45 The Court: It may be received then as Petitioner's Exhibit No. 1.

Mr. Snyder: Mr. Wallace, are you in a position to admit that this is Plaintiff's Exhibit No. 1—the Petitioner's Exhibit No. 1 is a correct record of what transpired insofar as it goes?

Mr. Wallace: No, I cannot admit such for the reason that the petition in itself states that respondent was furnished an incomplete copy.

Mr. Snyder: That is true.

Mr. Wallace: I suppose that was corrected or partially corrected by the receipt of the Board of Opinion but there are letters—a letter withdrawing the case from the first trial and others that are not there and—that are not there contained and for that reason I cannot admit it.

The Court: The document may be handed to the Clerk and may be marked as an Exhibit in this case and received in evidence for whatever it is worth.

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46 Mr. Snyder: Mr. Wade, will you be sworn?

FREDERICK W. WADE, being first duly sworn, testified as follows:

Direct Examination by Mr. Snyder.

Q. Your name is Frederick Wade?—A. Yes.

Q. Now, speak a little bit louder so the Court can hear you and so the reporter can get it. You are the petitioner in this case?—A. Yes.

Q. And you are the same Wade who was tried in the two Court-Martial proceedings which we have referred to here in this opening statement this morning?—A. Yes.

Q. I will hand to you the Petitioner's Exhibit No. 1 and ask that you examine that.

The Court: It is rather voluminous, the witness can't very well examine it at this time. I don't know just what you are asking about.

Q. (By Mr. Snyder): Can you identify that Exhibit 1, Mr. Wade?—A. Yes.

Q. Have you seen it before?—A. Yes, it was given to me after the trial.

The Court: I can't hear you, young man, just speak right out so we can hear you.

A. I say it was given to me after I was tried.

The Court: Speak right out.

47 Q. (By Mr. Snyder): By whom was it given to you, do you recall?—A. No.

Q. You then gave it to Mr. Brewster?—A. Yes, sir.

Q. So far as it goes, is it a complete and—strike out the word "complete"—is it an accurate record of the proceedings at those trials?—A. Well, I don't know that.

Q. All right. Handing you for your examination the last page of Plaintiff's Exhibit No. 1 I wish you would examine that and then state to the Court whether or not that is a true and correct statement of what happened at the second—at the first trial at the termination of the offering of evidence?—A. You want to know whether all of this took place?

The Court: I don't hear the witness.

Q. (By Mr. Snyder): You will have to speak a little louder, Mr. Wade?—A. This is as it happened, Your Honor.

Mr. Snyder: That last page which we wanted identified, Your Honor, I think there will be no objection, you have a copy of it there—simply shows that at the conclusion of the trial both the prosecution and the defense rested—stated they had no further evidence, and the Court was closed and then that the Court again stated they desired further evidence and would continue it until a later date set by the Trial Judge Advocate General. You have seen that, you have a copy of it.

(Colloquy here had between counsel, off the record.)

48 Mr. Snyder: The Petitioner's Exhibit No. 1 is offered not as a complete copy in response to your question, Mr. Wallace, but as a copy of the record of the trial, of both trials which this petitioner received as required to be furnished to him by the Articles of War when he requested it, and he did so request.

Mr. Wallace: And it is submitted that it is incomplete in some respects?

Mr. Snyder: That record is incomplete.

Mr. Wallace: There is no objection to it being admitted as the copy furnished the petitioner at the conclusion of the trial, if Your Honor please.

Q. (By Mr. Snyder): Mr. Wade, were you ever advised that your case was being withdrawn from the 76th Division Court-Martial? Did anyone ever tell you that your case was going to be withdrawn or that it was withdrawn from the 76th Division Court-Martial?—A. No.

Q. Did anyone ever tell you that it would have been—that it had been referred to the Third Army Court-Martial?—A. Not until I was charged in the Fifteenth Army.

Q. All right. That was at the time of the second trial then, when you first learned that, is that correct?—A. Yes.

Q. All right. Will you state to the Court whether or not you consented to the second trial?—A. I did not consent.

Mr. Snyder: That is all. You may cross examine, Mr. Wallace.

49 Cross Examination by Mr. Wallace.

Q. Mr. Wade, when were you inducted into the Army?—A. In June, 1943.

Q. When were you discharged from the Army?

Mr. Snyder: That is objected to as wholly immaterial, Your Honor. He has never been.

The Court: The record shows that he—that there has been some proceedings under which he was given a dishonorable discharge. I don't suppose any document has

been delivered to him excepting the Court order, is that correct?

Mr. Wallace: All I want to get is a statement that he was not discharged prior to the court-martial.

The Court: You may ask that question. Do you understand the question?—A. Yes, Your Honor.

The Court: You were not discharged other than as shown by these Court records, is that right?—A. Yes, that's right.

Mr. Wallace: I think that is all.

Mr. Snyder: You may stand down, Mr. Wade.

Respondent's Exhibit B.

Headquarters Fifteenth US Army
Office of the Army Judge Advocate
APO 408

21 July 1945

B-32 United States vs. Private First Class Frederick W. Wade (white), 39 208 980, and Private Thomas Cooper (white), 35 766 893, both Company K, 385th Infantry.

Present Ages: Wade: 28 11 12 years. Cooper: 31 4 12 years.

Dates of Enlistment: Wade: 21 June 1943. Cooper: May 1941.

Prior Service: As to each: None.

Date of Confinement: As to each: 18 March 1945.

Tried at: Bad Neuenahr, Germany.

Date of Trial: 30 June 1945.

Sentence: As to Wade: DD, TF, and CHL for life. As to Cooper: Acquitted.

(Maximum Authorized: Death.)

Prior Convictions: As to Wade: SCM, 20 Apr 44, AW 61 and 65, failure to repair and willfully disobeying NCO, disrespectful manner toward NCO; Sum CM, 15 Mar 44, AW 61, AWOL. As to Cooper: None.

Charges: As to Wade: Charge: AW 92. Pleas: Not guilty. Findings: Guilty. Spec: Rape. Pleas: Not guilty. Findings: Guilty.

Charges: As to Cooper: Charge: AW 92. Pleas: Not guilty. Findings: Not guilty. Spec: Rape. Pleas. Not guilty. Findings: Not guilty.

1. Evidence.

Accused Wade was charged with the rape of Rosa Glowsky, and accused Cooper was charged with the rape of

Mathilde Klein, violations of AW 92, both offenses occurring at Krov, Germany, on 14 March 1945 (R 5, 6). By direction of the appointing authority (R 2), a common trial was ordered, to which both accused consented in open court (R 3). One of the assistant defense counsels was absent, but both accused agreed to his absence (R 3). The Court was properly qualified as to conscientious scruples against the imposition of the death penalty (R 4). The Trial Judge Advocate correctly and timely called the Court's attention to the fact that the President of the Court would assume the duties of the absent Law Member in accordance with Article of War 31 and Paragraph 51, Manual for Courts-Martial, 1928 (R 5). Cooper had no special pleas and plead not guilty to the specification and charge (R 6). Wade interposed a special plea in bar of trial, based upon claimed former jeopardy (R 7), which plea was argued at length (R 7-12). The Court closed, deliberated upon the plea for ten minutes, and then denied it (R 12), following which Wade plead not guilty to the specification and charge (R 12). After the prosecution rested its case, Cooper interposed a motion for a finding of not guilty, which was denied (R 63). The President of the Court fully and properly explained to both accused their rights as a witness (R 163, 164), and each elected to testify under oath (R 164, 182). Following the close of its case, the Defense renewed Cooper's motion for a finding of not guilty; again it was denied (R 196). Cooper was found not guilty of the specification and charge (R 196) and was acquitted (R 197), but Wade was found guilty of the specification and charge (R 196) and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life (R 197).

It was established that each of the accused were in the military service of the United States on the date of the alleged offenses and at the time of trial (R 61, 62).

Due to the close relationship of the evidence relating to both accused, a separate discussion thereof is not deemed necessary; however, pertinent testimony as to certain major points of contention, such as time, identification of both accused, alibi, etc., will be summarized under separate sub-headings.

a. For the Prosecution.

American troops entered Krov, Germany, about 5:00 P.M., Tuesday, 13 March 1945 (R 21, 55). The next evening, shortly before 6 o'clock, two American soldiers were observed by several German civilians entering the Dietrich house, located across the street from the house owned by Matthias Weiskopf (R 31, 55); then, the same two soldiers entered the adjoining home of Anni Endt (R 13, 43). It was getting dark as they entered Mrs. Endt's kitchen through the back door (R 43). They stayed for ten or fifteen minutes (R 44), during which time Mrs. Endt was able to closely observe and remember the larger soldier, but could not remember or recognize the second soldier (R 44, 47).

Upon leaving Mrs. Endt's house, the two soldiers crossed the street and entered the Weiskopf house through the unlocked front door (R 13, 31, 49, 55). At this time, Rosa Glowsky, (age 24, married), one of the daughters of Matthias Weiskopf, was standing in Widow Jacoby's barn, on the same side of the street and just a short distance from the Weiskopf home. She observed the soldiers entering her home (R 13). Her father and sister, Mathilde Klein, (age 29, married), were in their kitchen, in the front part of the house (R 32, 56), while Regina Weiskopf, a daughter-in-law of Matthias Weiskopf, together with her children, were in their own kitchen, which adjoined that of her father-in-law (R. 49). After entering the house, the two soldiers came into the front kitchen (R 56), and the smaller, heavier-set soldier approached Mathilde, who was standing at the stove fixing supper (R 32, 56). He tapped her on the shoulder and indicated that she should go upstairs with him (R 32, 56, 57), while the larger soldier remained in the kitchen with her father and seated himself right next to the door (R 34, 57). At this time, it was still daylight (R 14, 32, 56).

Mathilde and the smaller soldier went to the rear kitchen, where he asked Regina to go out of the room (R 49), which she did, and accompanied by her children, went into the front kitchen (R 50). Then, Mathilde and the same smaller soldier went through all of the rooms upstairs, some store-rooms, other parts of the house, the

barn, and returned to the kitchen, where Mathilde asked her father for the key to the basement into which her male companion had indicated to her that he wanted to go (R 33, 34). Mathilde asked her father to come along, but the larger soldier, speaking in understandable German, said, "Alone" (R 33). Mathilde and the smaller soldier went to the basement, observed by Rosa, who, at this time, was still outside (R 14, 33). Upon arriving in the basement, the smaller soldier flashed his light around and then forced Mathilde into a corner upon a large, wine barrel (R 34). He removed her drawers (R 35) and proceeded to have sexual intercourse with her. At first, she resisted, fighting him off with her hands and feet; but she was nervous (R 34), excited, and afraid he would shoot her. He penetrated her private parts with his private parts (R 35). She did not consent to the act and moaned during its commission (R 35), which lasted about fifteen minutes. Mathilde tore herself loose and ran to the door of the basement, but the smaller soldier caught her and held her fast, attempting to engage her in conversation (R 36). After some fifteen or twenty minutes, Mathilde ran into the yard upstairs, followed by the smaller soldier (R 36).

Meanwhile, Rosa, some twenty minutes after first seeing the two soldiers enter her home, went into the front kitchen, joining her parents, Regina and her children, and the larger soldier, who, at that particular time, was standing at the kitchen cupboard (R 14). He laughed at her a little, and she sat down on a sofa in the corner, facing the larger soldier, who resumed his seat near the door (R 15). Then, this larger soldier told her to wait in the kitchen, while he went out, returned, went out a second time, and upon returning, motioned to her to come along with him, saying, in German, "Come along, lady" (R 15). He was armed with a pistol, carried in a holster (R 15). Rosa told her father to come along, but the larger soldier prevented this (R 16). She followed him, wholly afraid (because "everything was so new . . . I thought if he told me to come along, I had to come along" (R. 16)), to Regina's kitchen, where she asked the larger soldier that she permitted to go to the basement to get her child (R 16).

Instead, the larger soldier drew his pistol and "shut her up." He ordered her to lie down, with which she complied, afraid that he would shoot her (R 16). He pulled her drawers down, opened his pants, laid upon her, and held his pistol at her neck (R 17). At first, she fought him off with her arms (R 17); but she was unable to resist further. The larger soldier penetrated her private parts with his private parts, wholly without her consent or co-operation (R 18). This incident lasted about five minutes, following which she pulled up her drawers and went into the front kitchen, with the larger soldier following her (R 18, 36). At this time, Mathilde and the smaller soldier had not returned, so the larger soldier went to the house door, where he met Mathilde and the smaller soldier (R 19). The larger soldier took out a book and showed Mathilde something in it, though she didn't fully understand. She assumed that he wanted to know her age, so she pointed at a 30 (R 36). The larger soldier then returned to the front kitchen with Mathilde, pointed to the clock, and said, in German "Another hour" (R 36, 51, 58). This was shortly before 7:00 P.M. (R 37). Both soldiers then left, taking with them the key to the house (R 23, 58).

Thereafter, the entire Weiskopf family went into a neighbor's air-raid shelter and barricaded the door (R 23, 58). Both Rosa and Mathilde were crying, with the latter more visibly affected (R 37, 58). Mathilde went to the Pommer's house, excited (R 37). About 9:00 P.M. that same evening, Rosa saw another American soldier, who was billeted next door, and she told him what had happened (R 23).

On the following Sunday (18th) morning, a group of 10 to 15 American soldiers were brought to the Weiskopf home to participate in an identification ceremony. Both Wade and Cooper were among this group of men (R 62, Prosecution's Exhibit "B"). When Mathilde was told that American soldiers were being brought into the house, she had a nervous breakdown, but treatment by an American physician made her feel better (R 38). While she remained in bed, the soldiers were marched into her room, where there was an American soldier and a Polish woman

acting as interpreters, plus the American officer who was conducting the ceremony (R 39). Mathilde was asked to pick out the man who attacked her. The officer moved down the row of men, pointing his finger at each man individually, while Mathilde would nod her head in approval or disapproval. Soldiers not identified left the room (R 39). She picked out a black-haired man, who was not wearing a hat, but who was wearing a scarf and was clean shaven (R 40, 42). After the ceremony was over, Mathilde was satisfied (R 40). She testified that she did not hesitate or delay in her selection of the soldiers lined up in front of her, and that she did not select Wade, whom she had previously identified in Court (R 33). A short while later, Rosa, standing at the window of Mathilde's room, looked out and immediately spotted Wade standing in the outer yard, a few meters distant, with the group of soldiers (R 21, 25, 30). Rosa was not in Mathilde's room at the time of the formal identification ceremony there (R 26, 29). Rosa went downstairs to the front doorway and promptly selected Wade out of the entire group of soldiers as the soldier who had attacked her (R 27). Matthias Weiskopf also selected Wade out of the outdoor line-up, after Rosa had told him that he "would be able to recognize the soldier too," she having already done so (R 60). Then, Wade and the black-haired soldier whom Mathilde had selected were brought into the Weiskopf home, where statements of testimony were taken (R 27, 60). That same evening, another investigation was held at Kinderbeuren, where Rosa again saw Wade, as did she at the former incomplete trial (R 20).

By stipulation (R 62, Prosecution's Exhibit "B"), it was established that the 3rd and 4th Platoons of Company "K," 385th Infantry, were the only troops billeted in Krov, on 14 March 1945.

Testimony of Prosecution Witnesses as to Time of Alleged Offenses.

Rosa Glowsky was in Widow Jacoby's barn "before 6 o'clock . . . It could have been a quarter to 6 - ten minutes to 6" (R 13). She remained in the barn about twenty

minutes (R 13) and went into the front kitchen, at which time it was "absolute daylight" (R 14). The criminal attack by the larger soldier took "About five minutes. Maybe a little bit more than that" (R 18). After the attack, the soldiers did not remain long (R 19). From the time the two soldiers entered until they left, "Altogether, it could have been around an hour. . . . It was around an hour. They came shortly before 6 o'clock and it could have been close to 7 o'clock when they left . . . I still remember well because he pointed to the clock . . . It was around 7 o'clock . . . I don't know whether it was exactly 7 o'clock or a few minutes to 7" (R 22, 23).

Mathilde Klein saw the two soldiers enter the Dietrich house "around 5:30," and "about five to ten minutes" later saw them enter Mrs. Endt's house (R 31). The criminal attack by the smaller soldier upon her in the basement lasted "15 minutes; it could have been more. I can't say that exactly" (R 36), and the smaller soldier detained her at the basement door, following the attack "15 to 20 minutes" (R 36). When the larger soldier pointed to the clock, "it was about 5 minutes to 7" (R 37).

Anni Endt testified that the two American soldiers came to her house "Between 5:30 and 6 o'clock" at which time "It was getting dark" (R 43), and they stayed in her house "10 to 15 minutes" before leaving (R 44).

Regina Weiskopf first saw the two American soldiers "In my kitchen . . . On the 14th of March before 6 o'clock in the evening" (R 49). They stayed in the house "from about 6 o'clock until a quarter of 7," which she definitely remembered because the larger soldier, "When he was first at the kitchen, he was saying it is nearly 6 o'clock, and at that time, I saw that it was nearly 6 o'clock," and afterwards, when the same soldier pointed to the clock, "It was a quarter of 7" (R 51).

Matthias Weiskopf wasn't too certain as to time because "I never thought I'd have to go to court about it and I never looked at the clock" (R 57). He estimated that two American soldiers entered the Dietrich house "after 5 o'clock" (R 56), that "it was still daylight" when

they entered his kitchen (R 56), and that they stayed in the house "at least three-quarters of an hour" (R 58).

Testimony of Prosecution Witnesses as to Identification of Accused.

Rosa Glowsky identified Wade at the trial as the American soldier who attacked her (R 19). When at her house on 14 March 1945, she described him as "very tall, had a reddish mustache and was wearing a steel helmet which was covered by a net" (R 14). He carried a pistol in a holster (R 15). He spoke German that "was well understandable" (R 15). She did not notice anything about his hair, wound or scratches or scars on his face, or his teeth, because "I was afraid to look at him. I was afraid to look at him closely because he always looked at me"; yet, she added, "I recognize him also by his look out of his eyes. He had such a funny look. Especially today, I recognize him again because he has a mustache again. He looks the same way" (R 24). He had thick lips (R 29). Though he was clean shaven at the identification ceremony on the following Sunday and at the investigation held at Kinderbeuren, she still recognized him immediately (R 20) without needing help (R 29). She also identified him at the former incomplete trial (R 20), at which time, so far as she knew, he didn't have any teeth (R 28). The second soldier who entered her home was a little shorter than Wade, but she never got a good look at him (R 19).

Mathilde Klein identified Wade at the trial (R 33) as the larger of the two soldiers who entered her home on 14 March 1945 (R 36), wearing a field jacket, steel helmet covered with a net (R 32). He wore a mustache (R 36) and spoke some German (R 41). At the former incomplete trial, she testified that he had a good set of upper teeth (R 41), and identified him at the time (Page 21, Defendant Wade's Exhibit "A"). She did not select Wade at the identification ceremony, although he was present (R 40). The soldier who attacked her was the smaller of the two soldiers who entered her home and was heavy set (R 32); black-haired and wore a beard as long as the width of her little finger (R 38, 40, 41). He also wore a

field jacket, red scarf and a helmet (R 40). At the identification ceremony held in her room, she picked out a black-haired man, who was not wearing a hat, but who was wearing a scarf and was clean-shaven (R 40). When confronted with Cooper at the trial, she stated that "This man over here (Cooper) has many similarities" to the man who attacked her, "but I can't say it for certain." He looked "very much like that man" she picked out on the 18th; however, "It could be him but I don't want to accuse anyone without being sure. I just couldn't say that. He looks very much like him." (R 38). At the Kinderbeuren hearing, she could not identify the soldier who attacked her. (R 42).

Anni Endt identified Wade in the Court-room (R 44) as the tall man with a receding forehead, mustache and wearing a net over his helmet (R 46, 47), who entered her home on 14 March. She did not recall anything about his teeth, but she remembered that he carried a white bottle in his hip pocket and had a flashlight (R 46). She particularly remembered him, because "I was very afraid just when I looked at him" (R 45). Prior to taking the witness stand, she immediately recognized Wade outside during a recess (R 47). The second soldier entering her home was of average figure and wore a red scarf under his jacket (R 44); however, she could not identify Cooper at the trial (R 44). She was not present at the identification ceremony, Kinderbeuren hearing or former incomplete trial.

Regina Weiskopf identified Wade at the trial (R 50) as the larger of the two soldiers she saw in the Weiskopf home on 14 March. He was very tall, with reddish hair, mustache (R 49) and beard (R 52). He spoke German (R 50), and she was "certain" that he had upper teeth, because she observed them when he was "always laughing" (R 53, 54). She also identified Wade at the subsequent investigation though he was clean-shaven (R 52). The smaller soldier who was with Mathilde (R 49) wore a red cloth but she couldn't be sure of recognizing him again (R 50). She did not identify Cooper at the trial.

Matthias Weiskopf identified Wade at the trial (R 58), and described him as being the large soldier with a pointed

face that was not clean-shaven. He had a revolver and a holster (R 57). He identified Wade, though clean shaven, following the positive identification made by Rosa, on the morning of the 18th, but he had had ample time to observe Wade following the immediate selection by Rosa (R 60). The second soldier, who took Mathilde, was small, with a round face that was not clean-shaven (R 56). He did not identify Cooper at the trial.

b. For the defense.

The 3rd and 4th Platoons, Company "K," 385th Infantry, entered Krov, Germany, against no enemy opposition, about 5:00 P.M., on 13 March 1945 (R 66, 75, 88, 96, 109, 127, 142, 147, 154, 165, 183) and stayed there about five days. (R 76, 101). An undetermined number of French, Italian and Polish prisoners of war were liberated (R 76 88, 148, 154), none of whom wore helmets (R 81, 90), though some did wear American uniforms (R 143, 148).

The squads took billets the first night in the upper end of the town (R 76, 127), but moved their billets the next morning toward the center of the town (R 67, 77, 127, 143, 148, 167, 183). The 3rd squad, of which Wade was a member, was located about 100 yards below the 1st squad, of which Cooper was a member (R 66, 89, 166). The Weiskopf home was about four or five blocks away—a good ten or fifteen minute walk (R 104, 138, 176). The enemy, across the river, "threw in" some mortars and shells, so observers were sent out (R 115, 169, 186), including Wade, who went out in the morning and returned for the noon meal, after having made several trips in the interim. (R 185, 186). That afternoon, Wade visited Cooper at the latter's billets, and the two of them observed the enemy through binoculars between 1:00 and 1:30 P.M. (R 171, 186).

The 1st squad established a billet guard, composed of two sentinels, one of whom was supposed to stand at the door of the billet, while the other was supposed to patrol 100 yards each way in front of the billet, ready to alert the squad in the event of an enemy counter-attack (R 78,

169). Sentinels, serving tours of two hours on duty and six hours off duty were chosen from a guard roster (R 83, 94, 170). Cooper and Sergeant Levario were on guard duty from 10:00 A.M. to 12:00 noon, and from 6:00 until 8:00 P.M. on Wednesday, 14 March 1945 (R 67, 168). For the evening tour, they were posted at approximately 6 o'clock by Sergeant Rogers (R 67, 78, 168) and were relieved by Sommers and Shaffer at about 8 o'clock (R 68, 77, 170), after which Cooper and Sergeant Levario, accompanied by Sergeant Rogers went upstairs to Cooper's quarters and had coffee and something to eat (R 67, 170). While "pulling this guard" tour, it was just turning dark (R 74). Cooper stood right beside Sergeant Levario during the entire tour that evening (R 67, 169).

Wade arose about 6:00 A.M. on the morning of the 14th and went on guard until 8:00 A.M., after which he ate (R 189). He was seen at morning chow by Sergeant Mattson (R 97), Pfc Lambel (R 137), Pfc Zarilla (R 128) and Pfc Metzger (R 155). Along with the rest of the squad, he moved to new billets (R 183), ate, shaved wth Metzger (R 115, 157) and washed (R 184). When finished, he went downstairs, where Sergeant Mattson asked him if he'd care to observe the enemy aeross the river, to which Wade agreed (R 185). Sergeant Mattson fixed this time as about 11:00 A.M. (R 102), and Pfc Metzger testified that he was with Wade until about 11 or 12 o'clock that morning, though the latter did not recall Wade's going on this patrol (R 158). Wade went to the river side of town, in an alley, and observed the enemy across the river, returning several times to the squad's billet, and upon the completion of his mission, returned for the noon meal (R 186), where he was seen by Sergeant Mattson (R 97) and Pfc Metzger (R 158). After eating, Wade went up to see Cooper, visiting him between 12:30 and 2:00 P.M., observing the enemy through Cooper's binoculars (R 186). Cooper fixed this time as between 1:00 and 1:30 P.M. (R 178). Wade then returned to his billets and stayed around the dining room until about 3:00 or 3:30 P.M. (R 186), during which Pfc Zarilla saw him, remembering the time as 3:30 because a "church rang at that time" (R 132). Pfc Fessenden also saw him at this time (R

113). Wade went upstairs and went to sleep, not awakening until sometime around 6:00 P.M., finding Pfc Boley and Pfc Fessenden in his room (R 186). Pfc Boley fixed the time of his arrival in Wade's room as a "little after 6:00 P.M." and Wade was asleep at this time (R 149). Pfc Fessenden was also sleeping in the same room, and testified that he was awakened at 6:15 P.M., at which time Wade was awake (R 110). The three had a drink of wine (R 110, 186), after which Pfc Boley and Pfc Fessenden went downstairs, followed ten minutes later by Wade (R 110, 186). They talked downstairs for a while, until around 6:30, when Pfc Boley and Pfc Fessenden went to get some eggs, and returned between 7:00 and 7:15 P.M., finding Wade still downstairs (R 110). Wade testified that he waited in the dining room until the evening meal was served, sometime between 7:00 and 7:30 (R 186). He was seen during that time by Sergeant Mattson (between 7:00 and 7:45 (R 106)), Pfc Lambel (between 7:15 and 7:30 (R 137)), Pfc Metzger (about 7:00 P.M. (R 155)), and Sergeant Jones (R 143). About a quarter to eight that same evening, Wade went to Cooper's billet to look for the latter but could not find him. He spoke to one of Cooper's room-mates, who did not know where he was, so Wade returned to his billets (R 187), and went on guard at a late hour (R 188).

Wade wore false teeth (R 129). Shortly before entering Krov, he had broken his upper plate into two pieces (R 98, 110, 118, 144, 155, 172, 184) while cleaning them in the palm of his hand (R 144, 185). He did not get them fixed or wear them until after 6 June 1945 (R 124, 185), as a result of which he could not eat tough meat (R 98).

Some of the men in "K" Company wore silk scarves (R 74, 91). Though prohibited (R 91), Pfc Sklader always wore them (R 74, 79, 136, 142), usually bright-colored ones (R 79, 91, 112), as did Loe and Kefer (R 130, 142). Sergeant Mattson testified that Cooper had worn both G.I. and colored scarves (R 106), but he didn't remember when, nor was he certain that Cooper had one in Krov (R 100). Other defense witnesses stated that neither Wade nor Cooper wore scarves (R 74, 79, 112, 130,

137, 149, 173). Cooper testified that he never wore a scarf (R 173).

All of the men owned captured pistols, including Cooper (R 86), who admitted having one in his billets on the 14th (R 181), and another defense witness recalled that Cooper had carried a pistol in a German holster strapped to his belt (R 134). Wade stated that he did not have a pistol at Krov, but did possess one priorto that time when working in supply (R 187), which fact was corroborated by Sergeant Mattson (R 104).

Wade knew a few words of German, as did most men in the squad (R 136-137).

Cooper was present at the former incomplete trial of Wade, but did not participate therein; rather, he was outside of the court-room, awaiting trial himself (R 175).

Testimony of Defense Witnesses as to Identification Ceremony

Though the many defense witnesses gave slightly varying versions, it appears that the following occurred:

On Sunday morning, about two squads of American soldiers were taken to the Weiskopf home. They went upstairs to Mathilde's room, where she was in bed, nervous, excited and crying (R 99, 136, 150, 156, 188). One of the soldiers and a Polish woman acted as interpreters (R 98, 112, 135), while Captain Chambers, who was in charge, instructed Mathilde to "pick out the two soldiers that entered your home" (R 139, 179). Captain Chambers moved down the row of men (all of whom were wearing helmets (R 140)) standing before Mathilde and placed his hand on the shoulder or pointed to each man individually, after which Mathilde would nod her head. If she failed to identify a soldier, he left the room (R 98, 112, 129, 135, 142, 150, 156, 173, 187). During this process, Mathilde hesitated on Pfc Zarilla, Sergeant Mattson and Cooper (R 98, 112, 129, 135, 142, 151, 156, 178, 188), but they were permitted to leave the room when she failed to make positive identification; however, though she first indicated negatively as to Wade, she changed her mind,

so Wade, who was already leaving the room, was brought back and detained to the end (R 98, 100, 188). Cooper did not wear a scarf at this identification ceremony (R 173).

Thereafter the soldiers were taken downstairs and lined up outside of the front door. Rosa appeared in the doorway and without hesitation, immediately pointed to Wade (R 98, 113, 129, 136, 151, 173, 188), who was the tallest man in the group (R 123, 152). Several of the soldiers remarked "We thought it awful fast" (R 114.) Cooper was not pointed out by Rosa (R 174).

Neither Rosa or Mathilde were able to identify Cooper at the Kinderbeuren hearing (R 161).

Testimony of Defense Witnesses as to Beards Worn by Both Accused.

Cooper usually wore a beard, generally described as a blondish-red goatee (R 68, 78, 88, 93). A few days (variously estimated as two, three and four) before entering Krov, Sergeant Graves shaved off Cooper's long beard in exchange for a haircut given by Cooper to him (R 78, 90, 93, 172). The latter did not have much of a beard upon entering Krov (R 89), due, no doubt, to the fact that his beard was slow-growing (R 172); in fact, it was hardly noticeable (R 91), and Sergeant Levario, who spent some two hours talking to Cooper while on guard the evening of the 14th, testified that Cooper had no beard at all (R 68); however, Cooper testified that on that date he had one and one-half day's growth of beard (R 172).

Wade customarily wore a mustache and beard (R 78, 113, 128, 144, 152, 184). He testified that on the morning of the 14th, he shaved off a heavy beard and mustache (R 184), because of a fresh sore on his lip (R 184). That afternoon, about 3:00 or 3:30 in the afternoon, Pfc Zarilla commented on his lack of mustache (R 188), though no comment, which was usual in such cases (R 81, 114) was made either at noon or evening chow (R 191).

Sergeant Mattson stated that everyone shaved at Krov, shortly after moving their billets and before dinner on the

14th (R 97). He wasn't certain if Wade was clean shaven when he went on patrol (R 102), but he was positive that Wade was clean shaven at dinner (R 97, 108) and at the evening meal (R 102). Wade had a fresh sore on his lip that day (R 100).

Pfc Fessenden did not recall any comment at the noon meal of the 14th about Wade's mustache being missing (R 114, 117) and was fairly certain that Wade was not clean shaven from 9:00 until 12:00 that morning (R 116); however, he did recall that Wade's mustache was missing about 3:00 o'clock that same afternoon (R 113), because Pfc Zarilla commented on it (R 113, 117). He was positive that Wade's beard and mustache were missing at 6:00 P.M. that evening (R 110) and that Wade had a sore on his upper lip (R 114).

Lt. Oakley (by stipulation) stated that Wade shaved off his mustache soon after occupying Krov, and did so in the morning or early afternoon of the 14th (R 65, Defendant Wade's Exhibit "C").

Cooper testified that when he saw Wade between 1:00 and 1:30 P.M. on the 14th, the latter had no mustache (R 171, 178).

Pfc Zarilla recalled that Wade had his mustache when moving the billets on the morning of the 14th (R 128), but had removed it that afternoon by 3:30, because he (Zarilla) commented about it (R 128, 131), and Wade told him that his mustache had bothered his sore lip (R 128, 131).

Pfc Metzger testified that he and Wade shaved the morning of the 14th after moving their billets (R 155, 157), and he saw a fresh, raw sore on Wade's lip (R 159). Wade was clean shaven by noon (R 158).

Pfc Boley saw Wade most of the 14th (R 149), but was not sure about the condition of his mustache (R 149, 153); however, on cross-examination, the Trial Judge Advocate brought out that at the former incomplete trial, this witness testified that Wade had no mustache on the 14th (R 153).

Pfc Lambel didn't remember whether Wade was clean shaven on the morning of the 14th when the billets were moved, but recalled that he was clean shaven at the evening meal, because there were remarks made about that fact (R 137). He thought he saw a cut on Wade's mouth (R 138).

Both accused were placed in arrest on 16 March 1945 (R 193) and shaved that day (R 195); they also had shaved prior to the Kinderbeuren hearing (R 163).

2. Comment.

Wade was arraigned for trial of 27 March 1945, before a General Court-Martial appointed by the Commanding General, 76th Infantry Division, upon the same charge and specification as at instant trial. After both sides rested, the Court was closed, then opened, and the Law Member announced that the Court desired futrher witnesses to be called into the case, and that the case would be continued to allow time to secure certain witnesses named by the Court (Page 60, Defendant Wade's Exhibit "A"). The action of the Court was wholly proper. Paragraph 75b, Manual for Courts-Martial, 1928 (1943 Reprint), Page 58, provides:

"The Court is not obliged to content itself with the evidence adduced by the parties. Where such evidence appears to be insufficient for a proper determination of any issue or matter before it, the Court may and ordinarily should, take appropriate action with a view to obtaining such available additional evidence as is necessary or advisable for such determination. The court may, for instance, require the trial judge advocate to recall a witness, to summon new witnesses, or to make investigation or inquiry along certain lines with a view to discovering and producing additional evidence." (Underscoring supplied).

Defense Counsel argued that because the Court had deliberated and failed to reach a finding, an automatic acquittal resulted. Just how long the Court actually de-

liberated after both sides had rested is not shown, but some indication thereof may be determined by reference to the entire record of trial of that first incomplete trial. The Court met at 0920 hours (Page 2, Defendant Wade's Exhibit "A"), and after some 31 pages of testimony were received, the Court recessed until 1350 hours (Page 32, Defendant Wade's Exhibit "A"). Upon reconvening, some 27 pages of recorded testimony and unrecorded short closing arguments by prosecution and defense were heard by the Court, which then closed, after which it opened to announce the continuance and adjourned at 1700 hours. Assuming that approximately 10 pages of testimony per hour were recorded (allowing for preliminary procedures at the morning session), it is wholly probable that closing arguments by counsel were completed no earlier than 1645 hours.

Regardless of fifteen minutes or fifteen hours of deliberation by the Court, Article of War 40 is controlling. The Board of Review has held repeatedly that until the reviewing authority or confirming authority has finally acted upon a record, the trial is not completed (Dig OP JAG, 1912-1940, Sec 397 (1); CM ETO 1673 Denny, 1944, reported in Dig Op, BOTJAG, ETOUSA, page 206). There was no such finality of action as to this first incomplete trial of Wade, and his plea in bar of trial was properly overruled. (Winthrop, 1920 Reprint, pp 259-260, 451-452; Par 68, Manual for Courts-Martial, 1928 (1943 Reprint), page 53. Also see Dig Op. JAG, 1912-1940, Sec. 395 (37), page 227.)

The Defense Counsel, in a very able argument (R 7-12), attempted to apply the well known rules of civil law applicable to former jeopardy, and, in a measure, sought to discredit the citation of authorities contained in Winthrop, cited by the Trial Judge Advocate. It is interesting to note that at the time General Winthrop prepared his excellent and oft-cited volume, Article of War 40 (then Article of War 102) merely provided, "No person shall be tried a second time for the same offense" and it wasn't until the new codification of 1920 that the Article was enlarged to include the present, exact definition of a "trial." The foot-

notes to Military Laws of the United States (Annotated), 1939, Eighth Edition, calls attention to the augmented Article as follows: "This Article is almost entirely new." (Underscoring supplied). Yet, Winthrop was cited, in point, as late as II Bull, JAG, Nov 1943, Sec 397 (1), page 424.

Use of the former record of trial (Defendant Wade's Exhibit "A") in this connection was wholly proper (Par 68, Manual for Courts-Martial, 1928 (1943 Reprint), page 53.

The Court was wholly justified in acquitting Cooper. He never was positively identified, either by Mathilde Klein or other prosecution witnesses. His alibi was well-established and fully proven by witnesses who presented a straight-forward, unshakable story. It is believed that the Court would have been justified in sustaining Cooper's motion for finding of not guilty, either when originally made or when renewed at the close of the entire case, but the same result was attained by the ensuing acquittal.

"In rape cases, a reviewing authority will closely scrutinize the testimony upon which the conviction was obtained, and if it appears contradictory on material issues, incredible, unsubstantial, a court will reverse a conviction." (CM ETO 2625 Pridgen 1944, Dig Op ETO, page 442). The case against Wade resolved itself into a single issue—was he the American soldier who raped Rosa Glowsky on 14 March 1945? The record abundantly supports the fact that an American soldier had carnal knowledge of Rosa Glowsky and that act was done by force and without her consent.

"The reviewing authority is permitted to weigh the evidence and it is his duty to do so and to consider all other aspects of the case, in order that justice may be done." (CM ETO 4386 Green et al., 1945, Dig Op ETO, page 202). Here, a close reading of all of the testimony sufficiently supports the conclusion that accused Wade was the perpetrator of the offense against Rosa Glowsky. This conclusion remains despite Wade's positive denial thereof, and his testimony, supported by some

degree, by other witnesses, that he was at his billet at the time of the offense was committed. (CM ETO 3837 Smith, BW 1944, Dig Op ETO, page 444). The soundness of Wade's alibi was a question of fact for the court (Dig Op ETO, Sec 450 (1), page 402). "The weight to be given testimony by defense witnesses tending to establish an alibi for accused is a matter for determination by the Court. Such testimony may properly be rejected as false when considered in connection with other evidence." (Dig Op JAG, 1912-1940, Sec 395 (57), page 237). The testimony concerning the accused Wade's identification was definite. The Court heard the evidence, viewed the witnesses, and found him guilty. There is substantial evidence in the record to sustain the findings of the Court in this respect.

Considerable testimony was received from both prosecution and defense witnesses as to the identifications made of Wade at various times, some of which was not wholly admissible; however, though Wade had been placed in arrest prior to the actual identification of him by Rosa on Sunday morning, the prohibition announced in IV Bull, JAG, Jan 1945, Sec 395 (3), page 4, does not apply, for each prosecution witness who participated in the original identification actually identified Wade at that time; again actually identified him at the trial, and thereafter testified as to facts and circumstances surrounding the entire identification ceremony. "When a witness in his testimony identifies the accused, he may testify that on a prior occasion, he made an extrajudicial identification of the accused, and persons hearing the extrajudicial identification may likewise testify to it" (CM ETO 3837 (1944), reported in IV Bull, JAG, May 1945, Sec 395 (21), page 175, and Dig Op ETO, page 444. Such testimony of prior recognition was properly admissible (Dig Op ETO, Sec 395 (35b); CM ETO Williams, 1945), and it is felt that any subsequent testimony, whether by prosecution witnesses without objection by the defense or by the defense from its own witnesses, was not prejudicial error, particularly so when Wade himself, by his own sworn testimony, corroborated a good part of the testimony first received.

There are no errors or irregularities which adversely affect the substantial rights of the accused. The evidence is sufficient to support the findings and the sentence.

This offense occurred 14 March 1945, and final trial was not held until 30 June 1945, a delay of three and one-half months; however, it is adequately explained in the chronology sheet.

The conscientious Trial Judge Advocate and the equally capable Defense Counsel conducted the trial wholly in accordance with all announced War Department and Theater directives, and the Court jealously guarded the rights of each accused in every instance. Nothing is left to inferences in the record of trial; procedural gaps were not left to be filled only by presumption. Each accused was fully accorded "due process of law."

Wade, 26 years of age, white, was inducted 21 June 1943, at Fort Lewis, Washington. From a personal history accompanying the record, it appears that his legal residence is Parkland, Washington. He is married and has one child. He formerly worked as a warehouseman, loading and storing goods in a large warehouse. He completed seven years of grammar school, but did not graduate; however, he completed two years extension work in an academic course, and attained an AGTC score of "III-109." As far as is known, he has no civilian convictions.

Accused joined the 76th Division on 1 June 1944, and arrived overseas with "K" Company, 385th Infantry, in England, on 4 December 1944. He had more than two months of continuous combat on the Continent, doing such jobs as were assigned to him, including cook, assistant in supply, scout, and rifleman in the line. His efficiency rating as a soldier is "satisfactory," and he was described as "displaying courage and willingness to comply with any orders given him in combat, regardless of the danger to himself." He has two previous convictions (Special Court-Martial for violations of AW 61 and AW 65, and Summary Court-Martial, for violation of AW 61), both of which occurred in the United States while accused was a member of an anti-aircraft organization.

A psychiatric examination of the accused on 10 May 1945 discloses that he was not suffering from any mental abnormality, nor was he a battle fatigue casualty at that time; however, his Company Commander, in preparing the personal history, stated: "On the date the alleged attack took place, Pfc Wade had been in a tactical situation for about 4 days with little opportunity for rest or relaxation; however, it seems correct to assume that he was capable of distinguishing right from wrong throughout the entire period."

Accused is presently confined in the Oise Intermediate Section Guardhouse pending transfer to the Delta Disciplinary Training Center.

3. Recommendations.

Considering that the accused has been actively engaged in combat and his good record with the Division prior to this offense, it is recommended that the sentence be approved but that the period of confinement be reduced to twenty (20) years, and that the execution thereof be withheld pursuant to Article of War 50½. The U. S. Penitentiary, Lewisburg, Pennsylvania, is the proper place of confinement (AW 42, Cir 229, WD, 8 June 1944, Sec II, par 1b (4), 3b; as amended by Cir 25, WD, 22 January 1945, Sec II).

A form of action designed to accomplish this recommendation is submitted herewith.

MILTON J. MEHL,
Captain, MAC,
Asst. Army Judge Advocate.

I concur with the foregoing review which is well considered and thoroughly presented. The case was fully developed and amply proven.

Only one issue is presented in this case: Was Wade the soldier who raped Rosa Glowsky? Four witnesses, all German, positively identified the accused Wade. These same witnesses failed to identify Cooper. How careful these witnesses were in their identification is indicated in

the testimony of Mathilde Klein wherein she testified that Cooper, who was alleged to have raped her on the same occasion that Wade raped Rosa Glowsky " . . . looks very much like that man . . . It could be him but I don't want to accuse anyone without being sure. I just couldn't say that. He looks very much like him (R-38)." If the identification of Wade was purposely spurious, then why did not the witness also implicate Cooper by identifying him?

The German witnesses were simple people, villagers who had no reason to tell aught but the truth. The Court heard their testimony and the testimony concerning alibi and resolved the issue against the accused. The Court heard the testimony, saw the appearance and deportment of the witnesses and rejected the testimony of the accused's witnesses concerning alibi. Although the reviewing authority may properly weigh the evidence in a case (par. 87b, MCM) he should not overturn the findings of the Court unless their findings are based on incredible and unsubstantial evidence. This is not true in the instant case.

I recommend that the sentence, modified as recommended, be approved. Form of action is submitted herewith.

T. K. IRWIN,
Major, JAGD,
Acting Army Judge Advocate.

Restricted. (87).

B-11 Branch Office of the Judge Advocate General with the European Theater. APO 887. 7 Nov. 1945.

Board of Review No. 4, CM ETO 15320. United States v. Private First Class Frederick W. Wade (39208980) and Private Thomas Cooper (35766893), both of Company K, 385th Infantry.

Fifteenth United States Army. Trial by GCM, convened at Bad Neuenahr, Germany, 30 June, 1 July 1945. Sen-

tence: Cooper, acquitted. Wade, dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. United States Penitentiary, Lewisburg, Pennsylvania.

Holding by Board of Review No. 4.

Danielson, Meyer and Anderson, Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were arraigned separately and tried together with their consent upon the following charges and specifications:

Wade.

Charge: Violation of the 92nd Article of War.

Specification: In that Private First Class Frederick W. Wade, Company K, 385th Infantry, did, at Krov, Germany, on or about 14 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Rosa Glowsky.

Cooper.

Charge: Violation of the 92nd Article of War.

Specification: In that Private Thomas Cooper, Company K, 385th Infantry, did, at Krov, Germany, on or about 14 March 1945, forcibly and feloniously against her will, have carnal knowledge of Mathilde Klein.

Each accused pleaded not guilty (after Wade's plea in bar, hereinafter discussed, was overruled) and, three-fourths of the members of the Court present at the time the vote was taken concurring, Wade was found guilty of the Charge and Specification preferred against him. Cooper was acquitted. Evidence of two previous convictions was introduced against Wade, one by special court-martial for failure to repair at the fixed time to the properly appointed place of assembly and willful disobedience of and disrespect toward a noncommissioned officer in violation of Articles of War 61 and 65 respectively, and one by summary court for absence without

leave for 28 days in *villation* of Article of War 61. All members of the Court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged *from* the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, but reduced the period of confinement to 20 years, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

The proceedings as to Cooper were published in General Court-Martial Orders No. 54, Headquarters Fifteenth United States Army, APO 408, U. S. Army, 24 July 1945.

3. The prosecution introduced substantial competent evidence tending to show that on or about 14 March 1945, at Krov, Germany, Wade forcibly had carnal knowledge of Rosa Glowsky, as alleged in the Specification, while the defense introduced evidence to negative the issue of guilt. An issuable question of fact was thus tendered for resolution by the Court, and the findings of the Court, being responsive to the evidence before it, are not, under the circumstances presented by the record of trial, subject to reexamination here.

4. When the court convened, Wade interposed a plea in bar on the ground of former jeopardy (R2), but at the suggestion of the Court this plea was properly reserved until arraignment (MCM, 1928, par. 64, p. 50). Upon arraignment his plea in bar was renewed (R7), and in support thereof a duly authenticated record of former trial (at Pfalzfeld, Germany, 27 March 1945) by a general court-martial appointed by the Commanding General, 76th Infantry Division, was introduced (R7; Def. Wade's Ex. A (hereinafter referred to as "Def.Ex.A"); MCM 1928, par. 68, p. 53). The prosecution then introduced a letter from the Commanding General, 76th Infantry Division, to the Trial Judge Advocate of the former Court, withdrawing the Charge and Specification forming the basis for the proceedings appearing in the record of former trial prior

to the findings (R9; Pros.Ex.A). Argument was had upon the plea in bar (R9-12), the Court overruled the plea (R12), and Wade thereupon pleaded to the general issue (R12).

The action of the Court in overruling the plea in bar presents a *perious* question, and one which appears to be a matter of first impression.

The record of former trial discloses that Wade was tried before a court of competent jurisdiction upon the Charge and Specification involved here. He was arraigned and issues were joined by his plea to the general issue (Def. Ex.A, pp.5,6); the prosecution introduced evidence and rested (Def.Ex.A, pp.7-22); and the defense introduced evidence and rested (Def.Ex.A, pp.22-60). Both the prosecution and the defense then stated they had nothing further to offer, the Court stated it did not desire any witnesses called or recalled, and, after arguments were made, the case was submitted and the Court was closed. (Dec. Ex.A, p.60). The Court was opened later and announced that it desired to hear other named witnesses, and continued the case until a date to be fixed by the Trial Judge Advocate (Def. Ex.A, p.60). Seven days thereafter, on 3 April 1945, and prior to further action by the Court, the appointing authority withdrew the charges, and directed that no further proceedings be taken by the Court in connection therewith (Pros. Ex.A). On the same day he transmitted the charges and allied papers to the Commanding General, Third United States Army, with a recommendation for trial by general court-martial, stating that the case had been continued because of the unavailability of two witnesses due to illness, and that the tactical situation made the obtainment of the witnesses impracticable and precluded prompt disposition of the case (Charge Sheet, 4th Ind.). Thereafter, on 18 April 1945, the Commanding General, Third United States Army, transmitted the charges and allied papers to the Commanding General, Fifteenth United States Army, requesting that he assume court-martial jurisdiction because the civilian witnesses were residents of the territory under his jurisdiction (Charge Sheet, 5th Ind.). The Commanding General, Fifteenth United States Army, in compliance with this re-

quest, assumed court-martial jurisdiction, and on 26 April 1945, referred the case for trial by general court-martial (Charge Sheet, 1st Ind.).

The question for solution is whether Wade, under the facts disclosed by the record, was placed in jeopardy, so as to bar a second trial, when he was arraigned and tried by the general court-martial appointed by the Commanding General, 76th Infantry Division.

5. (a) That no person shall be *trice* placed in jeopardy for the same offense is a maxim of great antiquity which has found expression in the Constitution of the United States and the Articles of War (Winthrop's Military Law and Precedents (Reprint, 1920), p. 259). The Fifth Amendment, in pertinent part, provides that no person shall be subject for the same offense "to be twice put in jeopardy of life or limb," while Article of War 40 in part recites that "No person shall, without his consent, be tried a second time for the same offense." That the intendment of these two inhibitions against double jeopardy is the same, has long been recognized, and the "rulings . . . by the civil Courts will therefore be applicable to similar cases at military law." (Ibid, p. 259). The Fifth Amendment itself, however, is a limitation on courts-martial, as they, like other Courts deriving from an exercise of the Federal powers, are subject to the restrictions of the Bill of Rights except insofar as special constitutional provision for them is made (CM ETO 2297, Johnson and Loper; Sanford v. Robins, (C.C.A. 5th, 1940), 115 F (2nd) 435; United States v. Hiatt, (C.C.A. 3rd 1944), 141 F. (2nd) 664; cf. Ex parte Quirin, (1942) 317 U.S. 1, 87 L. Ed. 3). Thus in Sanford v. Robbins, supra at p 438, the Court said:

"We have no doubt that the provision of the Fifth Amendment, 'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb', is applicable to courts-martial. The immediately preceding exception of 'cases arising in the land or naval forces' from the requirement of an indictment, abundantly shows that such cases were in contemplation but not excepted from the other provisions."

Although this provision of the Fifth Amendment effects a limitation on the power of courts-martial, it is only a conditional limitation in that the accused may waive what for him is a personal right. The burden rests upon him to plead and prove his former jeopardy, and in the event of a failure of plea or proof waiver follows (Article of War 40; Dig. Op. JAG, 1912-40, sec. 397(4), p.242; Levin v. United States, (C.C.A.9th 1925), 5 F (2nd) 598; Brady v. United States (C.C.A.8th 1928); 24 F (2nd) 399; Caballero v. Hudspeth, (C.C.A.10th 1940), 114 F 92nd) 545; McGinley v. Hudspeth, (C.C.A.10th 1940), 120 F. (92nd) 523). Here, however, Wade pleaded specially at his first opportunity, and offered competent evidence in support thereof, and no waiver of his rights under the Fifth Amendment or Article of War 40 may be presumed.

In determining when an accused has been placed in jeopardy Courts have reached varying answers, but the opinions of the Federal Courts, which are specially ordained to construe the Constitution, are binding as to the meaning of the language in the Fifth Amendment. It is, of course, recognized that the prohibition is not against the peril of second punishment, but against being twice put in jeopardy (Kepner v. United States (1904), 195 U.S. 100, 49 L. Ed. 114); nor is jeopardy limited to a second prosecution after verdict by a fact-finding body. Some expressions may be found in the early text books (cf. Winthrop's Military Law and Precedents (Reprint, 1920), p.260) and cases which purport to limit jeopardy to a second prosecution after verdict or findings but they have never been sanctioned by the Supreme Court. In Kepner v. United States supra, the Court held that jeopardy should not be construed so narrowly and said (195 U.S. at p. 128, 49 L. Ed. at p. 124):

"* * * some of the definitions given by the textbook writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; * * * the weight of authority, as well as decisions of this Court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him * * *"

As determined by the Federal Courts, jeopardy attaches when an accused has been arraigned on a valid charge, has pleaded thereto, and a jury has been impaneled and sworn; and where a case is tried to a Court without a jury, jeopardy begins when he has been validly charged and arraigned, has pleaded and the Court has begun to hear evidence (McCarthy v. Zerbst (C.C.A.10th 1936), 85 F (2nd) 640). And where jeopardy attaches, for however short a time, the trial must proceed and be prosecuted to a legal termination, or the accused will be discharged and cannot thereafter be tried again under the same or a subsequent charge for the same offense (Cornero v. United States (C.C.A.9th 1931), 48 F (2nd) 69; United States v. Kraut (SD,NY, 1932), 2 F Supp. 16; 1 Wharton's Criminal Law (12th Ed.,1932), sec. 395, p. 547).

The power of the Court to terminate the trial because of imperious necessity, without affording an accused the right to plead former jeopardy in a subsequent prosecution for the same offense, has, however, been recognized. But this doctrine of imperious necessity is based on a sudden and uncontrollable emergency, unforeseen by either the prosecution or the Court,—a real emergency which by diligence and care could not have been averted. It has been held applicable to those cases where the jury is unable to agree (Dreyer v. Illinois (1902), 187 U.S. 71, 47 L. Ed. 79; Keerl v. Montana (1909), 213 U.S. 135, 53 L. Ed. 734; United States v. Perez (1824), 9 Wheaton 579, 6 L. Ed. 165; Logan v. United States (1892), 144 U.S. 263, 36 L. Ed. 429); to misconduct tainting the panel (Klose v. United States (C.C.A.8th 1931), 49 F (2nd) 177); where inflammatory press releases may have corrupted the jury (United States v. Montgomery, (S.D.N.Y.1930), 42 F (2nd) 254); when the relationship of a juror to an accused is discovered during trial (United States v. McCunn (S.D.N.Y.1929), 36 F (2nd) 52); where a juror becomes incapacitated during trial (Simmons v. United States (1891), 142 U.S.148, 35 L. Ed. 968); and where a juror is discovered to have been a member of the grand jury which returned the indictment (Thompson v. United States (1894), 155 U.S.271, 39 L. Ed. 146). It is an il-

lusive and expansive doctrine, not susceptible of precise definition, because it is designed to apply to emergent situations, and the restraints which are reasonable today may be arbitrary tomorrow (United States v. Giles (W.D. Okla. 1937), 19 F. Supp. 1009; Pratt v. United States, (App. D.C.1939), 102 F. (2nd) 275). All Courts, however, have recognized that the power should be exercised with caution, and that it should be limited to the most urgent circumstances. The rule was expressed aptly by Story, J., in United States v. Perez, supra, when he said: (9 Wheaton at p. 580, 6 L. Ed. at p. 165).

"* * * the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner."

In compliance with this admonition of the highest court, the power has been charily exercised.

The rule in the Federal Courts, and in most State Courts, is that the absence of witnesses or the unavailability of evidence is not ground for the termination of the trial by a discharge of the jury under the doctrine of imperious necessity, so as to sanction a second prosecution for the same offense (Cornero v. United States (C.C.A. 9th 1931), 48 F (2nd) 69; United States v. Watson, 1868), Fed. Cas. No. 16, 651; Annotation 74 A.L.R. 803; cf. Wharton's Criminal Law, (12th Ed., 1932), sec. 395, p.548 et sec). The same rule is, of course, applicable to termination by a nolle prosequi or by a withdrawal of charges (United States v. Kraut (S.D.N.Y.,1932), 2 F Supp. 16; Clawans v. Rives, (App. D.C. 1939), 104 F (2nd) 240).

The question was squarely presented in Cornero v. United States supra, where a plea of former jeopardy was sustained when a jury was impaneled but was discharged when the prosecuting attorney announced he was unable to proceed because of the absence of necessary witnesses. In holding that jeopardy attached and that the doctrine of

imperious necessity did not extend to the absence of witnesses, the Court said: (48 F (2nd), at p. 71 and p. 73).

"While their absence might have justified a continuance of the case * * * the question presented here is entirely different from that involved in the exercise of the sound discretion of the trial Court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. * * * There is nothing in the cases cited by the government that militates against the authority of the cases we have cited, which are to the effect that mere absence of witnesses discovered after the jury is impaneled is insufficient to deprive the accused of his right to claim former jeopardy upon a subsequent trial * * *."

The court further said (48 F (2nd) at p. 71):

"We are here dealing * * * with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice. * * * no Court has gone to the extent of holding that, after the impanelment of a jury for the trial of a criminal case, the failure of the district attorney to have present sufficient witnesses, or evidence to prove the offense charged, is an exception to the rule that the discharge of a jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same case."

In the instant case Wade was arraigned on a valid charge and specification before a general court-martial duly appointed by the Commanding General of the 76th Infantry Division. Both the prosecution and the defense introduced evidence and rested, and the Court stated it did not desire to have any witnesses called or recalled and closed. Applying the rule announced by the Federal courts in many cases, we have no difficulty in concluding that Wade was placed in jeopardy at that time. The Court might has returned a finding of guilty or not guilty with-

out further action by the prosecution or defense. As stated in Ex parte Ulrich (W.D.Mo. 1890) 42 F. 587, 595, where a somewhat similar factual situation was presented, "The law will give him the benefit of the presumption that the first jury might have acquitted him * * *."

We have no doubt that emergent situations, unknown to the civil courts, may arise in the administration of military justice which will call for the exercise of the doctrine of imperious necessity. The judicial process will be equal to such demands. That the absence of witnesses does not sanction the exercise of the doctrine is, however, no longer open to question. The Federal courts have spoken, and, " * * * no Court has gone to * * * [that] * * * extent." The rule is applicable to all courts, whether trial be with or without a jury (Kepner v. United States, supra), and since Grafton v. United States (1907), 206 U.S. 333, 51 L.Ed 1084, if not before, there has been no doubt that a general court-martial, within its special framework, is a court in the fullest sense of the word.

We see nothing which renders the absence of witnesses, as shown by the record of trial in this case, an emergent situation in exception to the rule in the Federal courts. Their witnesses may lie beyond the reach of process, if process issues witnesses may not respond, oral promises to appear may not be kept, and they may become ill during trial; but such difficulties in proof are not grounds for a termination of trial and a second prosecution. Imperious necessity means a sudden and overwhelming emergency, uncontrollable and unforseeable, infecting the judicial process and rendering a fair and impartial trial impossible. It does not mean expediency. The absence of witnesses, as the Federal courts have uniformly held, is not an emergent condition infecting the judicial process; it is only one of the hazards of trial known to all courts.

As affirmatively disclosed by the record, the continuance of the case was prompted by the court's desire to hear further testimony, and the withdrawal of the charges and the refefence of them to another court was occasioned by the absence of the witnesses from the juris-

diction of the appointing authority. This did not constitute the emergent situation infecting the judicial process required for the termination of the case so as to except the proceedings from the prohibition against double jeopardy in the Fifth Amendment. Wade's plea in bar in the instant case, being seasonably raised and supported by competent evidence, should, then, have been sustained. "American justice," as Vinson, J., said in Pratt v. United States (App. D.C. 1939) 102 F. (2nd) 275, 280, "will not countenance an accused standing trial twice for the same offense * * * ."

(b) There remains for consideration the language of Article of War 40 which provides that:

" * * * no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case."

It was urged by the Trial Judge Advocate at the trial (R 9, 10) that this language precludes a plea in bar on the ground of former jeopardy until action has been taken by the reviewing authority and, if there be one, the confirming authority; but we do not agree. The language, by its own terms, is plainly limited to those cases in which findings of guilty have been reached by the Court, and does not purport to apply to situations where trial is terminated prior thereto. It is plain and unambiguous, and does not permit the interpretation suggested. Congress obviously desired to provide for a rehearing upon disapproval by the reviewing or confirming authority of findings of guilty (Article of War 50), and the care it took to limit the sentence upon a rehearing and to prohibit rehearings upon findings of not guilty is evidence of the concern it entertained that the rights of an accused under the Fifth Amendment should not be frustrated. It provided for the automatic review of the findings and sentence, and the consent of the accused to such review being true in fact and presumed as a matter of law (Sanford v. Robbins, supra), a plea of former jeopardy may not

necessarily be interposed at the second trial (Sanford v. Robbins, supra). This is explainable by "analogy to a mistrial for failure of a jury to agree, since the reviewing authority whose concurrence is necessary does not agree, defeating the first hearing" (Sanford v. Robbins, supra, 115 F. (2nd) at p 439.; or by an analogy to the vacation of a verdict at the instance of an accused who thereby waives his protection against double jeopardy (Pratt v. United States, (App. D.C. 1939), 102 F. (2nd) 274), inasmuch as the consent of an accused to review by the reviewing or confirming authority is presumed as a matter of law.

If, however, Article of War 40 were ambiguous and subject to construction, doubts and ambiguities would yield to the persuasions of the Fifth Amendment, as an interpretation consistent with the constitution is preferred to one offensive thereto (McCullough v. Commonwealth of Virginia (1898) 172 U.S. 102, 43 L.Ed. 382), and as a construction leading to absurd consequences is avoided whenever a reasonable one is possible (United States v. Katz (1926), 271 U.S. 354, 70 L.Ed. 986).

Nor can the provisions of the Manual for Courts-Martial 1928, which provide that a nolle prosequi may be entered either before or after arraignment and plea and that it is not a ground of objection or of defense in a subsequent trial (MCM, 1929, par. 72, p. 57), and that the appointing authority may withdraw any specification or charge at any time unless the Court has reached a finding thereon (MCM, 1928, par. 5, p. 4), be construed to sanction the proceedings in this case. They too must be construed in sympathy with the Fifth Amendment and Article of War 40, which are not limitations on the power of the appointing authority to direct the entry of a nolle prosequi or to withdraw charges, but are limitations on the power to again try an accused after jeopardy has attached. The appointing authority has the undoubted power to direct the entry of a nolle prosequi before or after arraignment and plea, or to withdraw charges at any time prior to the findings, but when jeopardy has attached, and imperious necessity does not exist a nolle prosequi or to withdraw charges, but are limitations on the

stitutionality rather than to construe it so that it will run afoul of constitutional prohibitions. The power vested in the appointing authority to withdraw charges is a valuable and necessary administrative device and it may be preserved to him if its exercise is based upon the doctrine of "imperious necessity" as such doctrine is adjusted to meet the needs peculiar to the functioning of a courts-martial.

A frank recognition of the legal principle that jeopardy may attach before findings by a courts-martial seems imperative under the approved construction of the "double jeopardy" clause of the Fifth Amendment. On this major premise I believe that the doctrine of "imperious necessity" may for the reasons herein set forth, be expanded to include tactical situations which in the opinion of the appointing authority makes impractical the production of necessary witnesses. With that determination he may then exercise the power of withdrawal of the charges in accordance with the provisions of the Manual. Under such process of reasoning the Manual' provision is valid. Stated otherwise: The appointing authority may withdraw any specification or charge at his direction at any time before jeopardy attaches (CM ETO 9986, Goldberg), and he may withdraw any specification or charge after jeopardy attaches when "imperious necessity" dictates and "imperious necessity" in the functioning of military courts includes military necessity and tactical considerations.

8. I therefore conclude that the Commanding General of the 76th Infantry Division was authorized to withdraw the charge in the instant case from the court sitting at Pfalzfeld, Germany on 27 March 1945 and transmit the same to another jurisdiction for trial and that his action did not afford the accused the right to plead former jeopardy at the trial now under review.

9. I concur with the Board of Review in its conclusion that accused in the present trial was proved guilty of the crime charged. No errors prejudicial to the substantial rights of accused were committed at the trial, and the court had jurisdiction of the person and the offense. In

my opinion the record of trial is legally sufficient to support the findings of guilty and the sentence.

10. I transmit herewith forms of action in the alternative; one for use in the event you are in accord with conclusion of the Board of Review that the record of trial is legally insufficient to support the findings and the sentence and one for use in the event you agree with the conclusion set forth in this, my dissent, that the record of trial is legally sufficient to support the findings of guilty and the sentence. Alternative drafts of appropriate orders promulgating your conclusions are also transmitted herewith.

11. When copies of the published order are forwarded to this office, they should be accompanied by the record of trial, the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 15320. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 15320).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

3 Incls: Incl. 1: Record of Trial. Incl. 2: Alternative drafts of action. Incl. 3: Alternative drafts of court martial orders.

Transcript of Proceedings on Hearing of Respondent's Motion for Reconsideration, July 10, 1947.

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109 HON. ARTHUR J. MELLOTT, Judge, presiding.

Appearances: N. E. Snyder and Richard T. Brewster, appeared for Petitioner. James W. Wallace, Assistant U. S. Attorney, appeared for Respondent.

Be it remembered, on this 10th day of July, A. D. 1947, the above matter coming on for hearing before the Hon-

orable Arthur J. Mellott, Judge of the District Court of the United States for the District of Kansas, and the parties appearing in person and/or by counsel, as hereinabove set forth, the following proceedings were had:

Mr. Snyder: Petitioner is ready, if the Court please.

Mr. Wallace: The respondent is ready.

The Court: State your appearances for the record, please, gentlemen.

Mr. Snyder: R. T. Brewster and N. E. Snyder appearing for the petitioner, Frederick W. Wade.

Mr. Wallace: James W. Wallace appearing for the respondent.

The Court: You may proceed.

Mr. Wallace: If the Court please—

Mr. Snyder (Interrupting): Mr. Wallace, if I might interrupt you a minute.

If it please the Court, we wish at this time to interpose our objection to the hearing or consideration of this motion which has been filed on behalf of the respondent, requesting that Your Honor reconsider your decision entered in this cause on May 9, 1947. If I may, I should like briefly to be heard on that in advance of any argument on whatever merits there may be to the motion for reconsideration.

The Court: We will hear you.

Mr. Snyder: As we interpret the Federal Rules of Civil Procedure all post-decision motions are governed by those rules. The rules specifically state, Rule 81, that they shall apply where there is no procedure outlined by other—otherwise outlined by statute so far as habeas corpus proceedings are concerned. That language is as follows: "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings

is not set forth in statutes of the United States and has hereofore conformed to the practice in actions at law or suits in equity * * *" and listing among other proceedings, habeas corpus.

Now, there is no decision for post-trial motions in the habeas corpus statute, if the Court please. Therefore, we say that the Federal Rules of Civil Procedure govern this proceeding.

Now, with the advent of the Federal Rules of Civil Procedure, as Your Honor well knows, the term "limitation" or "rule" has been abolished. The rule to which I am referring was the one well known to Your Honor and all judges and lawyers that during the term of Court the Court has absolute control over its own judgments. Now that period of limitation has now been fixed at ten days by virtue of the provisions of Rule 59, sub-division (b). That rule requires that a motion for a new trial be served not later than ten days after the entry of the judgment except for a motion on the ground of newly discovered evidence, which may be made after the expiration of that period and before the expiration of the time for appeal.

Now, on a motion for a new trial, if it's timely filed, Your Honor may, if you are so advised and so determined on the record, in a case tried without a jury, open a judgment if one has been entered or take additional testimony, amend findings of fact, conclusions of law or make new findings or direct the entry of a new judgment. Now, that is the relief which they are asking in this motion. They have asked that the Court reconsider its decision
111 and opinion herein and make and enter its orders fixing the time and place where the respondent may submit additional evidence in proof of the facts hereinabove alleged with opportunity afforded the petitioner to submit countervailing evidence if he may desire. That is exactly the relief they are asking. They have filed no post-trial motion within ten days after the date of the decision as the rules require. There is only one other provision under which they might seek this or similar relief and that is under the provisions of Rule 60, but they have not attempted to bring themselves within the scope of the operation of that rule which provides that, "On motion

the Court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." No one of those three factors appears in this case; neither mistake, inadvertence, surprise or excusable neglect, those four factors—correction. They do not base their motion on that ground.

There has been a very recent decision of the United States Supreme Court construing an analogous provision in the new Federal Rules of Criminal Procedure. That is the case of the United States of America v. Honorable William F. Smith, a District Judge of the United States. The case was decided June 2, 1947, and is reported in 91 Law. Ed. Advance Opinions at page 1203. I will close with a brief summary of that case, Your Honor, and point out the principles which we think are there expounded and control action in this case. There, the defendant had been tried and convicted. He filed a timely motion for a new trial and assigned some fifty-four reasons why it should be granted. An appeal—the motion was denied. An appeal was taken and the Circuit Court of Appeals for the Third Circuit affirmed. The man was incarcerated and on the day following that the judge undertook to enter an order granting a new trial on the basis that he had reconsidered the grounds urged by the defedant in support of the motion for a new trial. In other words, the element there is the same as in this case, a reconsideration. The prisoner was released from the penitentiary on bail, and the question for decision in this case,
112 Your Honor, was whether or not the Court had the power to act after—on his own initiative after the expiration of the period provided by the Federal Rules of Civil Procedure. Rule 33—if I said Civil Procedure that was a—will you correct it? (Speaking to reporter.)

Rule 33 provides—of your Federal Rules of Criminal Procedure that if the trial was by the Court without a jury the Court may vacate the judgment it rendered, take additional testimony and direct the entry of a new judgment; quite similar to Rule 59 of the Federal Rules of Civil Procedure, but the provision is in this rule that a

motion for a new trial based on any other ground should be made within five days after the verdict or finding of guilty; that is, any other ground than newly discovered evidence.

The Court discusses that and ends up by holding that the Trial Court was without power to enter that order; that the ten-day period limited the right or the request for relief if not made within that time; the Court was without power to grant it on the Court's own initiative.

In the Opinion by Mr. Justice Jackson it was said: "We think that expiration of the time within which relief can openly be asked of the judge, terminates the time within which it can properly be granted on the Court's own initiative." They point out in the course of this opinion that the Rules of Civil Procedure provide that there is a timely limit given on which the Court may act on his own motion, so for those reasons and on the analogy of that case, Your Honor, we say that the Court is without power to entertain this motion they have now filed for a reconsideration of Your Honor's decision. They have not set up any of the grounds which would entitle them to come under the provisions of Rule 60, and they did not appear within ten days after the entry of the judgment, and they do not say they have any newly discovered evidence. They simply ask Your Honor to reconsider it and change your mind. We say now you are without jurisdiction to do so.

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113 Mr. Wallace: If the Court please, I am aware of Rule 59 which requires that in the Rules of Civil Procedure that a motion for a new trial or for other relief should be filed within ten days and urged to the Court, but it is further the contention that Rule 59 should be considered along and in the light of Rule 81 which was just read to the Court, I believe, by Mr. Snyder which is: "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United

bar a second prosecution in the event the accused pleads and proves his former jeopardy at the second trial.

Neither the provisions of the Manual nor Article of War 40 could confer power inconsistent with the Constitution. Executive orders and congressional acts have validity only to the extent that they are obedient to the Constitution.

6. The charge sheets show that Wade is 28 years seven months of age and was inducted 21 June 1943, and that Cooper is 31 years of age and was inducted in May 1941. Both were inducted to serve for the duration of the war plus six months. Neither had any prior service.

7. The Court was legally constituted and had jurisdiction of the persons and the offenses. Except as noted herein no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that Wade's plea in bar should have been sustained, and that the record of trial is legally insufficient to support the findings of guilty and the sentence as to him.

(Signed) LESTER A. DANIELSON, Judge Advocate.

(Signed) MARTIN D. MEYER, JR., Judge Advocate.

(Signed) JOHN R. ANDERSON, Judge Advocate.

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(98) ETO 15320 Cooper, Thomas; Wage, Frederick W.

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 21 Nov. 1945 To: Commanding General, United States Forces, European Theater (Main) APO 757, U. S. Army.

B-3 Pursuant to the provisions of the third paragraph of Article of War 50½, I transmit herewith the record of trial in the case of Private First Class Frederick W. Wade (39208980) and Private Thomas Cooper (35766893), both of Company K 385th Infantry (accused

Cooper was acquitted by the Court) and the holding of the Board of Review that as to accused Wade the record of trial is legally insufficient to support the findings of guilty and the sentence. I do not concur in the holding of the Board of Review and I submit for your consideration and action my dissent therefrom.

2. The Board of Review in its opinion has accurately summarized the facts pertinent to the issue which arose on accused's plea of former *jeparty*. I hereby adopt the same for purposes of my discussion. I am in accord with the Board of Review in its analysis of the principles of law applicable to the plea of former jeopardy and subscribe to the doctrine expressed in the opinion that in the trial of cases before general courts-martial, jeopardy within the meaning of the relevant provision of the Fifth Amendment to the Federal Constitution may attach prior to findings by the Court and approval of the sentence by the reviewing authority. I further agree with the Board of Review that the 40th Article of War must be read in the light of the Fifth Amendment and the adjudications of the Federal Courts with respect to the "double jeopardy" clause thereof. I also believe that the doctrine of "imperious necessity" as defined and discussed in the opinion of the Board of Review is applicable to courts-martial. My difference with the Board of Review revolves about the question as to the operative effect of the doctrine in trials before courts-martial and in the administration of military justice. Stated cogently the solution of the problem largely turns upon the applicability of the principles discussed in the opinion of the Circuit Court of Appeals (9th Cir.) in the case of Cornero v. United States (C.C.A. 9th, 1931) 48 F. (2nd) 69 (cited and discussed by the Board of Review) to the facts in this case.

3. I freely grant that in criminal prosecutions in the civil courts the rule of the Cornero case is not only fair and proper but is also dictated by sound constitutional principles.

The fact that the prosecutor, having entered upon the trial of an indictment and having thereby placed an accused in jeopardy, discovers he cannot sustain the same

without additional evidence, presents no legitimate reason for invoking the doctrine of "imperious necessity" so that the accused may again be tried on the same charge. The denial of the application of the doctrine under such circumstances is highly necessary if the constitutional provision against double jeopardy is not to be frittered away by legalistic sophistries. There are substantial reasons for refusing to consider the absence of witnesses as an "imperious necessity" in the trials of criminal causes in the civil courts. The place of the trial and the terms of court are fixed and determined by statute. The Court in advance of the commencement of the term according to usual practice sets the criminal cases for trial on stated dates and its calendar become matter of public notice. The prosecution therefore knows in advance approximately when it must be prepared to go to trial and have its witnesses available to testify in Court. Congress has provided by law the process whereby witnesses may be subpoened or may be held in custody pending their appearance at trial. If under these circumstances the prosecution ventures trial, participates in the selection of the jury and thereafter presents its available evidence, it does so with the full knowledge of the risk it incurs by placing accused in jeopardy. It is not, however, without remedy to care for the situation caused by unforeseen absences of witnesses. A motion for continuance, validly based, affords it reasonable means to prevent a miscarriage of justice. Under these circumstances the prosecution having failed to "make a case" should not be permitted to dismiss the indictment and try again for a conviction under circumstances which may be more favorable for success. Such methods are not consonant with our juridical philosophy and offend our sense of fair dealing and fair trials.

4. However, the static conditions of the civil courts do not prevail with respect to the military courts and particularly the military courts which must function in the field of operations and combat. Courts-martial are not permanent institutions in the sense of permanency of the civil courts. They are called into being at the will of the authority holding courts-martial jurisdiction. Their membership is subject to continuous change depending upon

other duties of the personnel who are eligible to be appointed members of same. They conduct their business at such times and places as general conditions in the field permit or require. They have no fixed and predetermined places of sitting. There are no terms of courts-martial (Cf: CM ETO-16623, Colby), and due to the exigencies of the situation under which they operate they cannot arrange trial calendars in advance with the same degree of certainty and accuracy as do the civil courts. In order to perform their duties efficiently and expeditiously, they must possess a high degree of flexibility. They conduct their trials under unusual conditions primarily dictated by the military situation and the condition of the command.

5. Aside from the inherent differences between our military and civil courts there is an aspect of the actual functioning of the former which must be given proper weight and consideration. Witnesses may be compelled, under penalty of law, to attend and give testimony in the civil courts of the United States. The witnesses come to the court; the court does not go to the witnesses. In this respect there is a certainty and security upon which the prosecution and defense alike may rely. With respect to the courts-martial sitting in the United States the same condition prevails (AW 23). In the functioning of our military courts in the field, however, and particularly in foreign countries entirely different conditions exist. In England by virtue of the Untied States of America (Visiting Forces) Order, 1942 (SR and O, 1942 No. 966) and orders of the (British) Army Council and Air Council (SR and O, 1942 No. 1679), compulsory attendance and testimony of British civilian witnesses are provided. In France, the attendance of civil witnesses largely depends upon the cooperation of the French police or the voluntary action of the inhabitants. In Germany, the compulsory attendance of civilian witnesses is theoretically possible because of the overriding power of the conqueror. In the case of the latter country, however, practical considerations will weigh heavily against theoretical possibilities. At the time of the first or incomplete trial, in the instant case it is a matter of notorious knowledge that

the ordinary means of travel in Germany were disrupted and in some areas entirely destroyed. While it is entirely possible in spite of combat conditions then prevailing at the time of the first trial on 27 March 1945 at Pfalzfeld, Germany, the necessary additional witnesses might have been produced by the prosecution at an adjourned session of the trial, that fact remains a matter of speculation. There is nothing in the record of trial upon which to base a reasonable assurance that effective means were available to the prosecution, whereby these witnesses could be produced. The court at the first trial after deliberating in closed session opened court and expressed the desire:

"that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the court, the parents of this person making the accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The court will be continued until a later date set by the TJA" (R 60 of Defendant Wade's Exhibit "A").

Seven days later and prior to further action by the court the appointing authority, Commanding General, 76th Infantry Division, withdrew the charges from the court which had been appointed by him and to which he had previously referred the charges for trial (R 9; Pros. Ex A), and directed that no further action in the case be taken by the court. The Board of Review narrates the subsequent proceedings as follows:

"On the same day he transmitted the charges and allied papers to the Commanding General, Third United States Army, with a recommendation for trial by general court-martial, stating that the case had been continued because of the unavailability of two witnesses due to illness, and that the tactical situation made the obtainment of the witnesses impractical and precluded prompt disposition of the case. * * * Thereafter, on 18 April 1945, the Commanding General, Third United States Army, transmitted the charges and allied papers to the

Commanding General, Fifteenth United States Army, requesting that he assume court-martial jurisdiction because the civilian witnesses were residents of the territory under his jurisdiction * * * (p. 3, underscoring supplied.)

6. The Board of Review has, in my opinion, most properly designated the doctrine of "imperious necessity" as

> "an illusive and expansive doctrine, not susceptible of precise definition, because it is designed to apply to emergent situations, and the restraints which are reasonable today may be arbitrary tomorrow * * *. All courts, however, have recognized that the power should be exercised with caution, and that it should be limited to the most urgent circumstances."

I believe that the situation disclosed in the instant case is, in the application of the doctrine to the military courts, well within the description of "urgent circumstances," notwithstanding the general accepted limitation of the civil courts,

> "that the absences of witnesses or the unavailability of evidence is not ground for the termination of the trial by a discharge of the jury under the doctrine of imperious necessity, so as to sanction a second prosecution for the same offense * * *."

The bases for my conclusions are: First, the inherent differences between the civil and military courts with respect to the permanency of their places of trial and the certainty of their administrative practice and court routine. These differences I have explained above. Second, the difficulty in securing the presence of civilian witnesses who are foreign nationals at a trial when a military court sits in a foreign country of the status of Germany. I have likewise discussed this problem above. Third, the tactical situation confronting an appointing and referring authority in the field when his forces are engaged in actual combat or are performing important police and occupational duties. On this point I desire to make further comments.

It is manifest that Congress intended to provide a mechanism in the administration of military justice whereby the courts would be able to function with reasonable efficiency and competency during the course of field operations in time of war. In order to ensure this flexibility and adaptability Congress imposed upon the appointing authority the administrative responsibility for the proper functioning of the general courts-martial of his jurisdiction. In order to permit him to meet this responsibility it was necessary to vest him with broad discretion in determining where and when the court should sit and what cases should be tried by it (cf: CM ETO 1554, Pritchard). Particularly when his command is engaged in the field in a foreign country under combat conditions or in occupancy of the country of a conquered enemy, his power and authority in this respect is of the utmost importance in the maintenance of discipline of his subordinates and in the performance of duties placed upon his command.

In the instant case the Commanding General of the 76th Infantry Division determined, in the exercise of this discretion that:

"the tactical situation made the obtainment of the witnesses impractible and precluded prompt disposition of the case" (p. 3).

When he learned of the request of the court that certain witnesses whose testimony it considered of importance should be produced, he was faced with a problem peculiarly within the scope of his authority. It involved something more than the problem which would confront a district attorney in the trial of a similar case in a civil court. The Commanding General was called upon to determine not only how these witnesses would be produced but also whether it was advisable to bring them to the place of trial. Consideration of the last question involved many factors of which he was the best judge, among which were the expediency and desirability of transporting German witnesses from their homes to the place of trial when the witnesses must be moved a considerable distance in time of combat; the methods and means of feeding and billeting them while they were absent from their homes, and

the time and effort for his personnel consumed in this effort. My difference with the Board of Review centers at this point. I cannot believe that the doctrine of "imperious necessity" when applied to our military courts is so limited as not to encompass this situation. I recognize it as a doctrine of limited application, but I believe that it does include the right of the appointing authority to stop the trial of a cause and withdraw the charges when there is presented to him for decision a problem possessing the complexities here involved. When he determined that the factical situation of his troops required that the trial be taken to the witnesses rather than the witnesses be brought to the trial, he decided a question which involved the military necessities of his command. It is not an unreasonable expansion of the doctrine of "imperious necessity" to include tactical situations which the appointing authority deems of sufficient seriousness as to prevent the production of necessary witnesses at the trial where the court then sat.

7. I have elected to discuss the legal problems here presented within the ambit of the opinion of the Board of Review rather than place my dissent upon the literal interpretation of the Manual for Courts-Martial which directs:

> "[an appointing authority] may withdraw any specification or charge at any time unless the court has reached a finding thereon" (MCM 1928, par. 5, p. 4).

I adopt this method of approach because I recognize that if the quoted provision of this Manual be given a literal application its validity is immediately called into question as a result of the interpretation of the "double jeopardy" clause of the Fifth Amendment by the Federal courts. Well defined constitutional principles appear to deny the right of the approving authority to withdraw the charges once jeopardy has attached to accused if such withdrawal is prompted solely by the fact that the prosecution has failed in its proof and the appointing authority capriciously desires to afford the prosecution another opportunity to secure a conviction. Under established canons of statutory construction the quoted provision of the Manual should be construed so as to uphold its con-

to refer it to the Commanding General of the Third Army for trial before another court-martial. Such determination of the Commanding General was somewhat analogous insofar as double jeopardy is concerned to the determination of the judge of a civil court that in view of a sudden and uncontrollable emergency arising during the progress of the trial of a criminal case the jury should be discharged and the defendant subsequently tried before another jury. Under the circumstances, the withdrawal of the case from the court-martial on the ground that the tactical situation made it impossible to produce the witnesses before the court-martial within a reasonable time and the subsequent trial before another court-martial did not subject petitioner to double jeopardy in violation of the Fifth Amendment.

The judgment of discharge is reversed, and the cause is remanded with directions to enter judgment denying the petition for the writ of habeas corpus and to remand petitioner to the custody of respondent.

Phillips, Chief Judge, dissenting:

Wade, hereinafter called petitioner, and one Cooper were charged with rape in violation of the 92nd Article of War.[1] They were tried jointly by a General Court-Martial constituted by the Commanding General of the 76th Infantry Division. The Court-Martial convened at Pfalzfeld, Germany, a town 22 miles from Krov, on March 27, 1945. Both the prosecution and defense presented testimony and rested. After the arguments had been presented, the case was submitted. After the Court-Martial had entered upon a consideration of its verdict, it announced that the case would be reopened for the production of additoinal witnesses with respect to the identity of the accused.[2]

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[1] 10 U. S. C. A. § 1564.

[2] "Law Member. The Court desires that further witnesses be called into the case, and to allow time to secure these witnesses, this case will be continued. We would like to have as witnesses brought before the Court, the parents of this person making the accusation, Rosa Glowsky, and also the sister-in-law that was in the room who could further assist in the identification or identity of the accused. The Court will be continued until a later date set by the T.[rial] J.[udge] A.[dvocate].

The Court then, at 1700 o'clock, P. M., 27 March, 1945, adjourned to meet at the call of the President."

Thus, it will be seen that the sole reason for reopening and continuing the case was the absence of witnesses.

Thereafter, on April 2, 1945, the Commanding General of the 76th Infantry Division dissolved the Court-Martial and transmitted the charges and allied papers in the case to the Commanding General of the Third United States Army with the recommendation that the charges be tried by General Court-Martial. In the letter of transmittal set forth below,[3] the Commanding General of the 76th Infantry Division stated that the case had been previously referred for trial by General Court-Martial which had entered on the trial; that two witnesses were unable to be present and the case had been continued so their testimony could be obtained; that due to the tactical situation, the distance to the residence of such witnesses had become so great that the case could not be completed within a reasonable time. Thus, it will be seen that the reason the Court-Martial was dissolved and the case transferred was the inability to produce conveniently the absent witnesses. There is no suggestion in the letter of transmittal or in the record here that the members of the Court-Martial were unable to proceed with the trial or that the trial could not be completed by such Court-Martial because of the tactical situation. Had the witnesses been there present, there seems to be no doubt that the trial could have been completed by such Court-Martial. Hence, its dissolution was due solely to the absence of witnesses for the prosecution.

No further action was taken until April 18, 1945, when the Commanding General of the Thrid United States Army transferred the charge to the Commanding General of the 15th United States Army. On April 26, 1945, the Commanding General of the 15th United States Army constituted a

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[3] "1. The charges and allied papers in the case of Pfc. Frederick W. Wade, 39208980, Co. K, 385th Inf., are transmitted herewith with a recommendation of trial by general court-martial. The case was previously referred for trial by general court-martial and trial was commenced. Two witnesses, the mother and father of the victim of the alleged rape, were unable to be present due to sickness, and the Court continued the case so that their testimony could be obtained. Due to the tactical situation the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time."

General Court-Martial at Bad Neuenahr, Germany, a town approximately 40 miles from Krov, on June 30, 1945. Petitioner interposed a plea of double jeopardy. It was overruled. The trial proceeded, resulting in the conviction of petitioner and the acquittal of Cooper.

The record in petitioner's case was submitted for review to the Staff Judge Advocate, 15th Army, pursuant to Article of War 46.[1] That reviewing authority, in a written opinion, held the record of trial legally sufficient, but recommended that the sentence be reduced, in view of petitioner's combat record. The Commanding General, 15th United States Army, approved the sentence, but reduced the period of confinement to 20 years. In compliance with the provisions of Article of War 50½,[2] petitioner's records were transmitted to the Branch Office of the Trial Judge Advocate in the European Theater of Operations for review. Board of Review No. 4 in that office concluded that the record of trial was legally insufficient on the ground that petitioner's plea of double jeopardy should have been sustained. The basis of that Board's finding was that the absence of witnesses did not come within the purview of the "imperious necessity" rule.

In further compliance with Article of War 50½, the record was forwarded to the Staff Judge Advocate General of the Branch Office, who dissented from the holding of the Board of Review on the ground that the decision of the Commanding General of the 76th Infantry Division that "a tactical situation made the attainment of the witnesses impractical and precluded prompt disposition of the case," was a determination which fell within the doctrine of imperious necessity. The case then passed to the Commanding General, United States Army, European Theater, under the provisions of Article of War 50½. He upheld the conviction.

Pefitioner, being confined under the sentence in the United States Penitentiary at Leavenworth, Kansas, filed his ap-

[1] 10 U. S. C. A. § 1517, and Par. 87(b), Manual for Courts-Martial.

[2] 10 U. S. C. A. § 1522.

plication for a writ of habeas corpus. The trial court granted the writ and discharged petitioner from custody.

Where a case is tried to a court jeopardy attaches when the accused has been indicted and arraigned, has pleaded, and the court has begun to hear evidence.[1]

Jeopardy undoubtedly attached unless the discontinuance of the trial, the withdrawal of the charges from, and the dissolution of, the first Court-Martial were justified under the "imperious necessity" rule.

To justify the discharge of a jury or other fact-finding body before verdict under the doctrine of imperious necessity, the reasons therefor must be emergent, urgent, and manifestly compelling.[2] It is a power which should be exercised with caution and only under urgent circumstances.[3]

The causes for which a jury may be discharged before verdict are stated in Wharton's Criminal Law, 12th Ed., Vol. 1, § 395, as follows:

"* * * The only causes for which a jury impaneled and sworn to try an accused on a criminal charge can be discharged by the court without a verdict are: (1) Consent of the prisoner; (2) illness of (a) one of the jurors, (b) the prisoner, or (c) the court; (3) absence of a juryman; (4) impossibility of the jurors agreeing on a verdict; (5) some untoward accident that renders a verdict impossible; and

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[1] McCarthy v. Zerbst, 10 Cir., 85 F.2d 640, 642, and cases there cited;
Clawans v. Rives, App. D.C., 104 F.2d 240, 242;
Daniels v. State, ——Okl.——, 29 P.2d 997, 998.

[2] United States v. Perez, 22 U. S. 579;
Simmons v. United States, 142 U.S. 148, 153;
Klock v. People (N. Y.), 2 Park. Crim. Rep. 678, 683, 684;
People v. Barrett (N. Y.), 2 Caines 304, 308;
United States v. Watson, D.C.N.Y., Fed. Cas. No. 16,651;
Commonwealth v. Fitzpatrick, ——Pa.——, 15 A. 466, 467;
Allen v. State, 52 Fla. 1, 41 So. 593;
Baker v. Commonwealth, 290 Ky. 165, 132 S.W.2d 766, 767;
State v. Grayson, ——Fla.——, 23 So.2d 484.

[3] In United States v. Perez, 22 U. S. (9 Wheat.) 579, the court said:

"* * * The power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner."

States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States."

We are also, and the Court is well aware of the rule that provides in those cases where the judgment of a Court is retained in the breast of the Court subject to his correction or modifications or additions as he desires.

Now, it is our contention here that the rule in this case is the latter one, the one I have just announced. We feel that the rule in habeas corpus is not one that was governed by the former practice, either at law or in equity. Consequently, the Court comes around to the point where he can consider this case in the general rule that the Court has the authority to modify those opinions, decisions, determinations which he retains. Consequently, we feel that the Court has—we may correctly urge here what information we would show to the Court on a motion—in this motion for reconsideration and that the Court might wish in the light of what information might be submitted to modify or amend its opinion.

The Court: The contention made by the petitioner in this case presents a matter which the Court itself had given some consideration to at the time that the respondent's motion for reconsideration was filed.

The case was fully tried before this Court several months ago as habeas corpus proceedings customarily are tried upon the record before the court martial whose judgment resulted in the incarceration of the petitioner in the habeas corpus proceeding.

114 Generally, the Court in sitting in a habeas corpus proceeding is limited in the action which it may take by the well-established rule of law that a habeas corpus proceeding is tried upon the record; and, if the record indicates that the Court or the tribunal imprisoning the petitioner was duly constituted, acted within the limits of its jurisdiction and imposed the sentence which was imposed,

the legality of the detention of the petitioner would rest there and upon that record—in the absence of what the Court may inaccurately refer to as some modification of the earlier rule in habeas corpus proceedings authorizing a Court in a habeas corpus proceeding to receive evidence de hors the record in a limited number of instances—the case would be decided. That rule, it seems to this Court, is itself quite limited and requires a Court reviewing a record or the legality of the detention of a petitioner in a habeas corpus proceeding to limit the scope of the inquiry to whether, by evidence de hors the record, the petitioner is able to establish that he was deprived of a right granted to him by the Constitution of the United States. Cases applying that rule fall generally into the category of where the petitioner is able to show by such evidence, for example, that he was deprived of his right to be repesented by counsel at every step of a criminal proceeding or perhaps where he is able to show that the rights accorded him under the Constitution to be tried by a jury duly selected in accordance with the law had been ignored or he had been deprived of some such rights.

Manifestly, some of the observations which the Court has made so far are perhaps more pertinent to the motion for reconsideration itself rather than being addressed to the question presented to the Court at this juncture; namely, whether there is anything that this Court should be considering at this time growing out of or springing from the motion for reconsideration which was filed in this Court considerably more than ten days after the opinion was promulgated and the order authorizing the
115 release of the petitioner was entered. Such opinion was filed and duly entered in this Court, I believe, on the 9th day of May, 1947. That was the final judgment and order entered by this Court. The petitioner was not actually released in accordance with the Court's order for a period of approximately ten days, some time having been consumed in complying with the requirement, which this Court had advisedly made, that the petitioner be required to give a good bond for his ultimate appearance in the event the case should be reversed by an Appellate Court. Thus, the order itself, I think, became a final order of this Court on May 9, 1947.

This Court, is always reluctant to be too adamant in applying purely technical rules of procedure if by so doing there is any likelihood that it is depriving one of the parties litigant of a substantial right. However, the rules of civil procedure are prescribed for the guidance of this Court precisely as they are for the guidance of other Courts, and this Court feels that it should make every reasonable effort to give them full effect.

A motion for reconsideration, it seems to the Court, is essentially a motion for a new trial. The trial has been concluded, final order has been entered and the Court must recognize that it is through with that particular case unless it is reopened and reviewed in the manner and under the circumstances contemplated by the statutes and the rules.

The Rules of Procedure lay down some principles to which the Court's attention has been redirected this morning. First, that a motion for a new trial should be filed within ten days after the final order of the Court. There are other rules permitting the Court to reopen the proceedings within a much later period provided the conditions are extant which give rise to the application of those rules. One, of course, is Rule 60 authorizing the correction of clerical mistakes or granting relief from the judgment or order on proper motion to relieve any party against mistakes, inadvertance, surprise or excusable neglect. This Court has considerable doubt that the motion for reconsideration presently filed and to which we are now making reference falls within that category.
116 There appears to be no attempt to frame the motion on any of those grounds or to have the Court reconsider for the purpose of correcting any matters which should be corrected.

This Court is familiar with the recent decision of the Supreme Court—United States v. Simth, —U.S.— (June 2, 1947)—which counsel has just read and which pertains to a criminal case. The opinion is, of course, conclusive upon this Court and must be applied but, in addition to that, the rule enunciated is most sound and reasonable; for, as I recollect the facts, without attempting to state them in detail, here is about what occurred:

After a final judgment had been entered by a District Court the case went to the Circuit Court of Appeals. After the Circuit Court of Appeals had gotten through with the case, a remand to the District Court was entered and the case was sent back. The district judge then attempted to grant a new trial on the theory that he could do so since he had given reconsideration to the grounds urged. The Supreme Court properly pointed out that a district judge should have, and should be allowed to take, all the time necessary to consider questions of law arising in the case, including questions of law arising on a motion for a new trial; but when he has finally entered his ruling he is then through with the case and thereafter all that he can do is to obey the mandates of the higher Courts.

This Court feels that it has reached the same stage in this proceeding. The matter was fully and completely, and the Court may even add expertly, tried before this Court. Carefully prepared briefs were filed by both parties. The Court ultimately found the time to give consideration to the record, the evidence, the arguments and the briefs filed by the parties. The record was carefully reviewed and a perhaps unduly lengthy opinion was written. This Court is now of the opinion, gentlemen, that it should not at this time attempt to reconsider the case; so the present holding will be: first, that the motion for reconsideration appears to be in the nature of a motion
117 for a new trial not filed within time; and, second, that this Court does not feel that it now has authority to reconsider the case.

Appropriate order may be prepared monumenting the views of the Court.

Mr. Snyder: Thank you, Your Honor.

Filed in the District Court July 25, 1947.

Clerk's Certificate to Record.

United States of America, District of Kansas, ss:

121 I, Harry M. Washington, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be true, full, and correct copies of so much of the record and proceedings in case No. 980 H. C., entitled Frederick W. Wade, Petitioner vs. Walter A. Hunter, Warden, United States Penitentiary, Leavenworth, Kansas, Respondent, in said Court, as is called for by appellant's Designation of Record on Appeal and Appellee's Designation of Additional Portions of the Record, Proceedings, and Evidence to be included in Record on Appeal, on file herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, in said District of Kansas, this 17th day of September, 1947.

(Seal.) HARRY M. WASHINGTON, Clerk.

Filed September 30, 1947.—Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Record Entry: Cause Argued and Submitted.

First Day, May Term, Monday, May 10th, A. D. 1948. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard and was argued by counsel, Frederick B. Wiener, Esquire, appearing for appellant, R. T. Brewster, Esquire, and N. E. Snyder, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

Opinion.

[September 7, 1948.]

Frederick Bernays Wiener, Special Assistant to the Attorney General, (Randolph Carpenter, United States Attorney and James W. Wallace, Assistant United States Attorney, were with him on the brief) for Appellant. R. T. Brewster and N. E. Snyder for Appellee.

Before Phillips, Chief Judge, and Bratton and Huxman, Circuit Judges.

Bratton, Circuit Judge:

Frederick W. Wade, hereinafter referred to as petitioner, was a Private First Class in the 76th Infantry Division of the Army, engaged in the prosecution of the war in the European theater. He was charged under the ninety-second Article of War, 41 Stat. 805, 10 U.S.C.A. §1564, with the rape of a German woman. A duly constituted general courtmartial began the hearing of the charge. The prosecution and the defense each introduced testimony, rested and submitted oral argument; and the court closed. Thereafter on the same day, the court opened, announced its desire to hear the evidence of three certain persons, and further announced that the court would be continued until a later date to be set by the trial judge advocate.

About seven days later, the Commanding General of the 76th Infantry Division withdrew the charge from the court-martial and transmitted it to the Commanding General of the Third Army with a recommendation of trial by court-martial. About two weeks later, the Commanding General of the Third Army transmitted the charge to the Commanding General of the Fifteenth Army with the request that the Fifteenth Army assume court-martial jurisdiction. The charge was then referred for trial to a general court-martial of the Fifteenth Army. Petitioner seasonably presented to that court-martial a plea of double jeopardy in bar of trial. The plea was denied; petitioner was found guilty; and he was sentenced to dishonorable discharge, total forfeitures, and imprisonment for life. The period of confinement was later reduced to twenty years. As thus modified, the sentence was approved and confirmed; and petitioner was confined in the federal penitentiary at Leavenworth, Kansas, for its service. He instituted this proceeding a habeas corpus against the warden of the penitentiary to secure his discharge from further confinement on the ground that the sentence was void for the reason that he was twice placed in jeopardy for the same offense. The warden answered; petitioner was produced in court; evidence was submitted; and the court entered judgment ordering the discharge of petitioner, 72 F. Supp. 755. Thereafter, the court entered an order denying the motion of the warden for a reconsideration. The warden appealed from the final judgment of discharge and also from the order denying the motion for reconsideration.

Article 1 of the Constitution of the United States empowers Congress to make rules for the government and regulation of the land and naval forces; and in the exercise of that power, Congress enacted Articles of War, effective June 4, 1920, 41 Stat. 787, 10 U.S.C.A. §1471, et seq. Article 3 provides that courts-martial shall be of three kinds, general, special, and summary. Article 4 provides that all officers in the military service, and officers of the Marine Corps when detached for service with the Army, shall be competent to serve on courts-martial for the trial of persons lawfully brought before such courts for trial. Article 5 provides that general courts-martial may consist of any

number of officers not less than five. Article 8 provides for the appointment of members of general courts-martial; Article 12 provides that general courts-martial shall have power to try any persons subject to military law for any crime or offense made punishable by the articles; and Article 92 provides that any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as the court-martial may direct, but that no person shall be tried by court-martial for such offenses committed within the States or the District of Columbia in time of peace. General courts-martial duly created in accordance with the controlling provisions of law are legal tribunals, clothed with authority to determine with finality any case over which they have jurisdiction; and their proceedings when duly confirmed are not open to collateral attack in a civil court except on jurisdictional grounds. Accordingly, where the petitioner in a case of this kind is being detained by virtue of a sentence of a general court-martial, the scope of the inquiry is limited to questions of jurisdiction of the court-martial, whether that court was properly constituted, whether it had jurisdiction of the subject-matter and of the person of the accused, and whether the sentence was one authorized by law. Ex parte Reed, 100 U.S. 13; Carter v. Roberts, 177 U.S. 496; Carter v. McClaughry, 183 U.S. 365; McClaughry v. Deming, 186 U.S. 49; Collins v. McDonald, 258 U.S. 416; Benjamin v. Hunter, ——F. (2d)——. But within the range of such limited review, a federal court has jurisdiction in habeas corpus to determine whether the sentence of the court-martial was void for the reason that petitioner was twice placed in jeopardy for a single offense, and if so to order his discharge. In re Snow, 120 U.S. 274; Hans Nielson, Petitioner, 131 U.S. 176; Clawans v. Rives, 104 F. (2d) 240; Amirine v. Tines, 131 F. (2d) 827.

It is the general rule that an accused is in jeopardy within the meaning of the guaranty against double jeopardy contained in the Fifth Amendment to the Constitution of the United States when he is put on trial in a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction, and a jury has been empaneled and sworn; and where the case is tried to the court without the intervention of a jury,

jeopardy attaches when the court begins the hearing of evidence. McCarthy v. Zerbst, 85 F. (2d) 640, certiorari denied, 299 U.S. 610; Clawans v. Rives, supra.

But where it appears during the trial of a criminal case that a juror made false statements in the course of his voir dire examination respecting his relation to the defendant, where it appears that a member of the jury has been guilty of improper conduct in relation to the trial, where it appears that a juror was a member of the grand jury that returned the indictment, where it appears that a juror is too ill to proceed with the trial, where it appears that the jury is unable to agree upon a verdict, or where it appears that some other fairly like uncontrollable circumstance has arisen, and the court in the exercise of its sound judicial discretion discharges the jury, the constitutional guaranty against double jeopardy does not bar a subsequent trial before a different jury. United States v. Perez, 9 Wheat. 579; Simmons v. United States, 142 U.S. 148; Logan v. United States, 144 U.S. 263; Thompson v. United States, 155 U.S. 271; Dreyer v. Illinois, 187 U.S. 71; Keerl v. Montana, 213 U.S. 135; Pratt v. United States, 102 F. (2d) 275. However, the constitutional guaranty protects an accused against a second trial where the jury in the first trial was discharged solely on the ground that witnesses for the government were absent and therefore their testimony could not be adduced. Cornero v. United States, 48 F. (2d) 69; United States v. Shoemaker, 27 Fed. Cas. 1067; State v. Richardson, 25 S.E. 220; Allen v. State, 41 So. 593; People v. Barrett, 2 Am. Dec. 239; Pizano v. State, 54 Am. Rep. 511.

A valid charge was pending before the first court-martial. The court had jurisdiction of the subject-matter and of the person of petitioner, and evidence was introduced. Petitioner concedes that the Commanding General of the 76th Infantry Division was vested with authority to discharge the court or to withdraw the charge from it before completion of the trial, but that after the withdrawal petitioner could not be again placed on trial before another court-martial over his plea of former jeopardy. It does not appear from the record before us that any underlying basis for the action was set forth in the order withdrawing the charge and directing that no further action be taken by the court;

but in the communication of the Commanding General of the 76th Infantry Division transmitting the charge and related papers to the Commanding General of the Third Army it was recited in clear terms that the case had been referred to the court-martial for trial; that the trial was commenced; that the court continued the case in order that the testimony of certain witnesses could be obtained; and that due to the tactical situation, the distance to the residence of such witnesses had become so great that the case could not be completed within a reasonable time. It thus appears that the withdrawal of the charge from the court-martial was not predicated solely upon the absence of the witnesses at the time of the trial, through oversight or otherwise, or solely upon the absence of the witnesses at the time the charge was withdrawn. Instead it is fairly clear that the withdrawal was based upon the tactical situation, intervening and developing after the trial which made it infeasible to produce such persons before the court-martial at its then location. Distance of the persons from the then situs of the court was one element entering into the situation. Perhaps other essential elements inhered in it. That the armed forces of the United States engaged in the prosecution of the war in that theater were moving rapidly and that conditions in the field were more or less fluid are matters of history of which judicial notice may be taken. It may be that due to hazardous surroundings, fluidity of conditions, or other emergencies arising out of the prosecution of the war, it was wholly infeasible if not impossible to produce the persons before the court at its location at the time of the withdrawal of the charges. On the other hand, it may be that distance or emergencies growing out of the prosecution of the war did not make it impossible or unreasonably difficult to produce the witnesses before the court and obtain their testimony. It may be that the case should have remained with the court instead of being withdrawn. But that was a matter to be determined by the Commanding General in the exercise of his sound discretion; and, taking into consideration the conditions and circumstances presenting themselves, he determined in the exercise of such discretion that the tactical situation made it necessary or advisable to withdraw the case from the court-martial and

(6) extreme and overwhelming physical or legal necessity. * * * "

Under the weight of authority, the absence of a witness or witnesses for the prosecution does not constitute grounds for the discharge of the jury under the doctrine of imperious necessity.[9]

When a prosecutor enters upon a trial, knowing that material witnesses for the prosecution cannot be produced, he takes the chance that his proof may fail, and he is not entitled to have the jury discharged in order to afford him an opportunity to produce the witnesses at a second trial; and the court may not of its own motion discharge the jury because of the absence of witnesses for the prosecution.[10]

Since it is my opinion that the sole reason the trial was adjourned, the charges withdrawn, and the Court-Martial dissolved was the absence of witnesses for the prosecution, it is my conclusion that the Commanding General of the 76th Infantry Division was not justified in dissolving the Court-Martial under the doctrine of imperious necessity.

It follows that when petitioner was subjected to the trial before the second Court-Martial, he was placed in jeopardy twice for the same offense in contravention of his rights under the Fifth Amendment to the Constitution of the United States.

The denial of his plea of former jeopardy may be raised in a proceeding on habeas corpus.[11]

For the reasons indicated, I respectfully dissent.

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[9] Cornero v. United States, 9 Cir., 48 F.2d 69, 73;
Pizano v. State, 20 Tex. App. 139, 54 Am. Rep. 511;
Allen v. State, 52 Fla. 1, 41 So. 593;
United States v. Watson, Fed. Cas. No. 16,651;
State v. Richardson, 47 S. C. 166, 25 S. E. 220;
State v. Williams, ——Mo.——, 92 S.W. 151, 152;
Note, 74 A. L. R. 803.

[10] State v. Homes, ——Fla.——, 15 So.2d 613, 615;
People v. Warden of City Prison, 202 N. Y. 138, 95 N. E. 729, 733;
People v. Barrett (N. Y.), 2 Caines 303, 308.

[11] Clawans v. Rives, App. D. C., 104 F.2d 240, 244;
Bens v. United States, 2 Cir., 266 F. 152, 157.

Judgment.

Seventy-second Day, May Term, Tuesday, September 7th, A. D. 1948. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of discharge be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with directions to enter judgmnet denying the petition for the writ of habeas corpus and to remand petitioner to the custody of respondent.

Petition for Rehearing of Appellee.

United States Circuit Court of Appeals

Tenth Circuit.

WALTER A. HUNTER, Warden, United States Penitentiary, Leavenworth, Kansas, *Appellant*,

vs.

FREDERICK W. WADE, *Appellee*.

Appeal from the District Court of the United States for the District of Kansas, First Division.

PETITION FOR REHEARING OF APPELLEE.

No. 3575.

PETITION FOR REHEARING OF FREDERICK W. WADE.

Comes now Frederick W. Wade and petitions the court for a rehearing upon the following grounds:

I.

The opinion and judgment of the court deny to petitioner the protection of the Fifth Amendment of the Constitution adopted as a safeguard against the conviction

and confinement of an innocent man by twice placing him in jeopardy for the same offense, a safeguard which is especially vital to soldiers tried by court-martial since they are not accorded the right of trial by jury, bail, appeal, and other safeguards granted civilians to insure against miscarriages of justice.

II.

The opinion and judgment of the court extend the doctrine of imperious necessity as applied to the Fifth Amendment to permit the Commanding General, not a member of the court-martial, to determine out of the presence of the court-martial and the person on trial that imperious necessity existed, and to presume that the Commanding General made such determination from an ex parte statement made *for* him that "due to the tactical situation, the distance to the residence of such witnesses has become so great that the case cannot be completed within a reasonable time," coupled with the fact that he did in fact withdraw the case, even though there was no proof as to what the *tactical situation* was or what the *distance* was or what the *reasonable time* was.

III.

The opinion and judgment of the court ruled the case upon grounds not relied upon by appellant who based his appeal on the ground the combat situation prevented the completion of the trial, whereas the court ruled the case on the ground it could be presumed that the Commanding General determined in the exercise of a sound discretion that it was infeasible, or impossible to produce the witnesses within a reasonable time and that, therefore, it was necessary or advisable to withdraw the case.

IV.

The opinion and judgment of this Court ignores the following findings of fact made by the court below:

1. The absence of witnesses, rather than an emergency due to the military situation, was the reason for the withdrawal of the case from the court-martial which first heard it. R. 25.

2. The Commanding General did not find that a military situation existed which required the discontinuance of the trial before the court appointed by him and the transfer of the cause to a jurisdiction where military conditions permitted the production of the witnesses. R. 24.

3. The "tactical situation" was not the motivating reason for discharging the first court-martial. R. 25.

These findings of fact are supported by substantial evidence, and are not clearly erroneous. The court, in setting aside these findings and making new and opposite findings, violated Rule 52 (a) Federal Rules of Civil Procedure and overruled a heretofore unbroken line of decisions of this Court, which decisions were cited on pages 9 and 10 of the supplemental brief for appellee and have been overlooked by this Court.

In connection with this point and other points, your petitioner requests permission to supplement the record settled by the parties based upon the statement of points relied on by appellant to include (1) the letter withdrawing the case, (2) the proceedings before the second court-martial, on double jeopardy set out in the appendix to the petition for rehearing, (3) the written brief of the prosecutor on double jeopardy and (4) the cablegram from the Fifteenth Army to the 76th Division. These were before the court below and support the inference that if the prosecutor had any evidence that the case was withdrawn by necessity he would have introduced evidence to prove it.

V.

The opinion and judgment of this Court, though tacitly approving, in fact disapproved *Cornero* v. *U. S.*, C. C. A. 9, 48 F. (2d) 69; *United States* v. *Shoemaker*, 27 Fed. Cas. 1067; *State* v. *Richardson*, 25 S. E. 220; *Allen* v. *State* (Fla.), 41 So. 593, and *Pizana* v. *State*, 20 Tex. Ct. App. 139, 54 Am. Rep. 511, and tacitly disapproved *United States* v. *Perez*, 22 U. S. 579; *United States* v. *Watson*, 28 Fed. Cas. 499 (No. 16,651); *Baker* v. *Commonwealth*, 290 Ky. 165, 132 S. W. (2d) 766; *State* v. *Grayson* (Fla.), 23 So. (2d) 484; and the opinion and judgment is in conflict with the following additional cases: *U. S.* v. *Kraut*, 2 F. Supp. 16; *Mullins* v. *Commonwealth*, 258 Ky. 529, 80 S. W. (2d) 606.

The opinion in this case authorizes a mistrial to avoid the bar of double jeopardy upon grounds uncertain as to their scope or existence or their emergent nature.[1] We have found no authority to support it and earnestly urge that the court inadvertently overlooked the rationale of the cases above cited which is that before a mistrial can avoid the bar of double jeopardy a court must *judicially* determine in the presence of the defendant that the *trial* cannot be completed, due to uncontrollable and emergent circumstances and that the completion of a trial is not dependent upon the production of specified witnesses even though a case cannot be made without them.

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[1] Thus the court states: "Instead it is *fairly* clear that the withdrawal was based upon the tactical situation intervening and developing after the trial which made it *infeasible* to produce such persons before the court-martial at its then location. Distance of the persons from the then situs of the court was one element entering into the situation. *Perhaps* other essential elements entered in it. * * * it may be that *distance or emergencies* growing out of the prosecution of the war did not make it impossible or *infeasible* or *unreasonably difficult* to produce the witnesses before the court and obtain their testimony. It may be that the case should have remained with the court instead of being withdrawn. * * * he determined in the exercise of such discretion that the tactical situation made it *necessary or advisable* to withdraw the case. * * *." (Italics ours.)

VI.

The court overlooked the fact that the issue of imperious necessity was not before the second court-martial, and since it was not then raised, it should not have been considered by the court below or by this Court. The ultimate issue in this habeas corpus proceeding is whether the judgment of the court-martial is void. If void, petition must be discharged. Upon the court-martial record, it was clearly void since the only basis for denying the plea in bar of double jeopardy was that there had not been a finding by the first court-martial. Thus the discussion of imperious necessity in the opinion of Board of Review No. 4, based upon the unsworn, unsigned, ex parte indorsement made for the Commanding General, was dictum. In reality, there was only one question necessary to a decision on the petition for habeas corpus. Does jeopardy attach prior to a court-martial finding? This point was urged by petition under Point II, page 12 of the brief for appellee, but was not passed upon by the court. Perhaps the situation was not made clear in the transcript of record. It is made clear in the full record lodged with the court, a part of which appears in the appendix to this petition.

VII.

The opinion and the judgment of the court in holding that the Commanding General occupies a position analogous to the judge of a civil court overlooked the fact that he is no part of the court, would have no personal knowledge of the trial before the court or of the conditions confronting the court, which facts were pointed out on pages 6 to 8 of the supplemental brief for appellee.

VIII.

The opinion of the court insofar as it suggests emergencies, hazardous surroundings, and tactical situation intervening and developing after the trial, and the impossibility of producing the witnesses before the court-martial within a reasonable time indicate that the court gave credence or weight to the motion for reconsideration and the statements of the counsel for appellant who wrote his briefs on this appeal and argued the case to the court since those suggestions cannot be inferred either from the transcript of the record or the full record lodged with this Court. These statements of counsel are unsupported and unsupportable.

IX.

The court, in holding that the Commanding General exercised a "sound discretion" in determining that the case should be withdrawn because it could not be completed within a reasonable time, overlooked the fact, pointed out under Point II, page 10 of the brief of appellee, that the case necessarily could be completed in a shorter time than it would take to try the case anew. A majority of the witnesses who testified at the first trial, seven out of nine, were members of the 385th Infantry, 76th Division. They testified for petitioner. Can there be any question but that it would be easier and quicker to bring the three German witnesses to the first court-martial, regardless of the distance, than to try the entire case over again and send the seven members of the 76th Division the same distance to the situs of the second court-martial?

The withdrawal was not sensible under any theory or supposition of facts. It was obviously ill advised, unnecessary and unjust. No defense of it has ever been made by anyone who served in Germany.

X.

The opinion of the chief judge is manifestly correct and should become the opinion of this Court. It gives proper effect to the findings of fact of the court below, and to the applicable law, and to the supreme justice of the case.

WHEREFORE, by reason of the premises, petitioner prays for a rehearing upon the grounds aforesaid.

Respectfully submitted,

R. T. BREWSTER,
907 Federal Reserve Bank Building,
Kansas City, Missouri,
N. E. SNYDER,
210 Brotherhood Block,
Kansas City, Kansas,
Attorneys for Appellee.

Certificate of Counsel.

We hereby certify that the foregoing petition is filed in good faith and not for purposes of vexation or delay and is believed by us to be meritorious.

R. T. BREWSTER,
N. E. SNYDER.

APPENDIX.

1st IND.

Headquarters Fifteenth U. S. Army, APO 408, U. S. Army, 26 April 1945.

Referred for trial to Captain Milton J. Mehl, MAC, Headquarters Fifteenth U. S. Army, Trial Judge Advocate of general court-martial appointed by paragraph 1, Special Orders No. 81, Headquarters Fifteenth U. S. Army, 21 April 1945, as amended.

By Command of Lieutenant General Gerow:

(Signature) F. J. Heath,
F. J. Heath,
Major, AGD,
Asst. Adj. Gen.

Prosecution: Private First Class Wade, you are arraigned upon the charge here referred for trial, which I have just read, and I now ask you how you plead to the specification and charge but before receiving pleas to the general issue, however, I advise you that special pleas or motions, if any, should be made at this time.

Does the accused, Wade, have any special pleas or motions?

Defense: He does. He has a plea in bar of trial which he wishes to present to the court and in support of this plea in bar of trial, he offers in evidence as Defendant Wade's Exhibit "A", a duly authenticated record of trial by general court-martial appointed by the Commanding General, 76th Infantry Division. The trial was held at Pfalzfeld, Germany, on the 27th of March 1945.

Prosecution: No objection on the part of the prosecution to the admission of that record in evidence. In opposition to the motion on the plea in bar of trial, the prosecution would like to be heard at this time.

President: Subject to objection by any member of the court, the record of trial will be received in evidence. The court will not consider anything in the record that involves evidence but will only consider that part of the record that deals with the arraignment of the accused and the final action of the court.

There being no objection by any member of the court, the above-mentioned record of trial was received in evidence and marked as Defendant Wade's Exhibit "A".

President (to defense): Is that all you have to say? Have you any further remarks on this?

Defense: I would like to set out what the record shows. The record shows that the case against Private First Class Wade was tried; that after the prosecution and the defense rested, the court stated it wanted no further evidence, the prosecution stated it had no further evidence, the defense stated it had no further evidence and the court was closed. After deliberating on the case—and I state that when a court does deliberate on a case, it certainly places in jeopardy the man whose case is being deliberated on—the court reopened and requested the calling of certain other witnesses.

The case was continued for those witnesses and I maintain that that court and no other court has the right to sit in judgment upon the case against Pfc Wade. It would be a strange thing if other courts can sit in judgment on the case, not only would it violate the constitutional rights of Pfc Wade given to him by the Fifth Amendment against twice being placed in jeopardy for the same offense, not only does it violate the plain language of Article of War 40 but it violates every sense of justice and the due administration of justice because when you shift cases around, you allow time to lag, you allow witnesses to die in action and to disappear and you allow memory to fail. I say that not only on constitu-

tional and legal grounds but on common sense grounds, this case should be barred as the only court which has jurisdiction is the court of the 76th Division of which Pfc Wade was a member. I ask the court to consider those grounds.

Prosecution: The prosecution, in opposition thereto, would like to offer in evidence as Prosecution Exhibit "A", a letter of Headquarters 76th Infantry Division dated 3 April 1945.

Defense: That is objected to as being illegal and void.

Prosecution: May I ask the defense counsel to state why it is illegal and void as an item of evidence?

Defense: After a defendant has been placed in jeopardy, you cannot take that case away as an instrument for referring it to another court. I don't object to it because of the fact that it is not sworn but * * *

President: I wish you would be a little more specific. Your statements are too general for the court to get an idea of what your specific objection is. (To prosecution) This is a letter from whom that you are trying to offer in evidence?

Prosecution: The Commanding General, 76th Division addressed to the general court-martial which heard the case.

Defense: Withdrawing the charges.

President: Is it your contention that that is an illegal order?

Defense: Well, it is illegal as an instrument to bring it into any other court. That's what I mean. I'm not trying to be legalistic about it but I don't want it to appear that anybody can take cases from one court after it has deliberated and give them to some other court.

Prosecution: I think that is a matter for the court to determine. I think that unless the defense counsel has

some objection to it as a document, it should be admitted. As to the contents of it, he may make any statement he wishes to show that they are illegal, but unless he has some objection to it as a document, I think it should be admitted in evidence.

President: Did the court arrive at a finding as to guilty or not guilty in this case?

Defense: They did not.

President: Subject to objection by any member of the court, this letter will be admitted in evidence.

There being no objection by any member of the court, the above-mentioned letter was received in evidence and marked as Prosecution Exhibit "A".

Prosecution: Further, in opposition to this motion, the prosecution would like to submit a brief on the law of double jeopardy to the court, it being the contention of the prosecution that the accused in this case has not been tried under the 40th Article of War.

President: Has the defense seen this brief?

Defense: Yes, sir. I have.

President: You have had an opportunity to prepare any discussion you have on it?

Defense: It was handed to me this morning and I have read it and I will comment on it.

The trial judge advocate then handed several copies of the above-mentioned brief to the court, and, also, one to the defense counsel.

Prosecution: I would like to call the court's attention to Article of War 40 as cited in this brief, particularly those parts that are underlined—which is my underlining.

"No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which the accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case."

Argument one is that if the court shall be deemed not to have tried the accused after a finding of guilty as the article allows, certainly anything short of a finding shall not be considered a trial.

I won't read the entire brief because I think that is sufficiently clear, but I would like to call to the court's attention the paragraph on the second page of the brief from Winthrop, "Military Law and Precedents," 2nd Edition, 1920, pp. 262-263, which I will now read:

"Discontinuance before finding not equivalent to acquittal or amounting to jeopardy. It remains to notice the principle, applicable equally to civil and military cases, that where instead of a complete trial on the merits, the proceedings are discontinued by some interlocutory action, the accused, though not in fault, is not to be regarded as having been acquitted or put in jeopardy. Thus where an indictment has been duly abated by the entry of a *nolle prosequi*, or on a motion to quash, demurrer, or other proceedings; or where the trial has been broken off by reason of the death or disability of a juror or the judge, or of the defendant himself; or where by reason of an irreconcilable difference of opinion among the jurors, the jury has been discharged—the defendant has not been legally 'tried' and cannot plead *autrefois acquit* upon a separate trial for the same offense. So, at military law, neither a mere arraignment, nor an arrest followed by a discharge without trial, nor a service of charges withdrawn or dropped without prosecution, nor a withdrawal of charges after arraignment or pending the trial, nor a discontinuance of the proceedings, by the order of the convening authority, for any cause before a finding, nor a permanent interruption

of the same by reason of war or other exigency, nor a failure of the court to agree upon a finding, followed by a dissolution—will amount to an acquittal or a 'trial' of the accused."

I ask the court to find any clearer language to cover this case than that particular paragraph from Winthrop. The charges in this case were withdrawn from the court before a finding was ever reached and under all rules of military law, the accused has not been tried under the 40th Article of War unless a finding has been reached. I think the law cited in this brief will amply support my opposition to this motion.

Now, the defense counsel has made much of the fact that witnesses will die and members of the court will die and one thing or another. That has nothing to do with the double jeopardy. It so happened that a substantial period of time has elapsed here and undoubtedly people have died, including members of the court, but the main thing is whether or not this man has been tried and he has not been tried under the law that I have cited.

efense: Before going into the law, I want to point out that in the last paragraph before the conclusion of this brief the statement, "Both sides had rested, and the court at that time had continued the case for the purpose of securing more evidence, and never reached a finding," does not reflect the record. The record shows that the court was closed and reopened for further evidence. In other words, there were deliberations upon the innocense or guilt of the accused.

Now, as to the law: I searched what limited law there was in Bad Neuenhr and found no cases ruling this question. I think it is a brand-new question; that never before has it been presented or never before has it arisen.

The citation of Winthrop—which is the law the trial judge advocate is relying upon—on its face is inapplicable because of such statements as if the court cannot agree then there has been no trial and there

can be another trial. Now, as I understand military law, there is no such a thing as a hung jury as this author is apparently discussing. If the court cannot agree by that majority which the Articles of War require, then the accused must be discharged, so that he is citing an ancient and probably capable author, but he is not citing someone who understands military law as it now is administered. It is perfectly true that if there is a mistrial then double jeopardy does not apply, but absent a mistrial, then double jeopardy does apply. As soon as the court has been sworn to well and truly try the case upon the evidence, then, absent a mistrial, that court is the only court that can sit in judgment upon the accused in the particular case.

What is double jeopardy?-It is simply the proposition that the fathers who wrote the Constitution said that a man cannot be placed in jeopardy of life and limb twice for the same offense. That's what it is. I practiced law for some time in the Federal and state courts and I don't have access to those cases now, of course, but once a jury was sworn, absent a mistrial or absent a reversal on an appeal or something like that, that man could not be tried again. This case goes even further because the court sat and deliberated upon the innocence or guilt of the accused. True, under the court-martial manual, they had a perfect right to reopen the case for further evidence—that they could do—but only that court could listen to the evidence from those other witnesses.

Prosecution: The defense counsel states that state and Federal courts hold that once the jury is empanelled or the court sworn, as in this case, the man is put in jeopardy. I call the court's attention to the third paragraph of my brief where I state, citing Winthrop, "Military Law and Precedent," 2nd Edition, 1920, page 259, "that state courts on the subject of jeopardy are in variance, some holding that a prisoner is in 'jeopardy' when he has been put on his trial before

a jury duly empanelled and sworn. But the quotation from Winthrop, *supra*, it should be noted, states that the U. S. courts have held 'jeopardy' to mean tried, and courts-martial, so far as not otherwise prescribed in the Manual for courts-martial or by act of Congress, will apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States.'

I ask the court to notice the second paragraph of my brief where I cite Winthrop and briefly show to the court that former trial and jeopardy are not identical and a man is not tried until a finding is reached in U. S. courts and in military courts.

Defense: But I dare say that every case which Winthrop cites, and I found it time and time again to be true, are cases where there has been a mistrial such as it is found that the jury has been tampered with or the trial judge advocate makes prejudicial remarks or something like that. Those are the cases, and then some law writer tries to telescope all the law into a few sentences which I think, on its face, is absurd.

President: Anything further?

Prosecution: I will rest on Winthrop.

Defense: I will rest upon the Articles of War and the Constitution.

President: In discussing this case by the court, nothing in the record of the previous trial that involves evidence will be considered so the court will not be prejudiced should the motion be denied. Only that part of the record that deals with the arraignment of the accused and that part dealing with the final action of the court will be considered.

The court will be closed.

The court was closed at 1000 hours and reopened at 1010 hours, at which time all members of the court, the trial judge advocate, the defense counsel, the assistant defense counsel, the two accused, the German interpreter, and the reporter who were present at the close of the previous session in this case, resumed their seats.

President: The plea of the accused, Private First Class Wade, in bar of trial is denied.

Order Denying Petition for Rehearing.

Fifteenth Day, September Term, Friday, October
A. D. 1948. Before Honorable Orie L. Phillips, Chief Ju
and Honorable Sam G. Bratton and Honorable Walter
Huxman, Circuit Judges.

This cause came on to be heard on the petition of appe
for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by
court that the said petition be and the same is hereby
nied, Honorable Orie L. Phillips, Chief Judge, dissenting

On October 19, 1948, an order of the United States Co
of Appeals was entered staying the mandate of the s
court for a period of thirty days from October 19, 1
under provision of paragraph 3 of rule 28 of said court.

Clerk's Certificate.

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Co
of Appeals for the Tenth Circuit, do hereby certify
foregoing as a full, true, and complete copy of the des
nated transcript of the record from the District Court
the United States for the District of Kansas, and full, t
and complete copies of certain pleadings, record ent
and proceedings, including the opinion (except full c
tions, titles and endorsements omitted in pursuance of
rules of the Supreme Court of the United States) had
filed in the United States Court of Appeals for the Te
Circuit in a certain cause in said United States Court
Appeals, No. 3575, wherein Walter A. Hunter, Ward
United States Penitentiary, Leavenworth, Kansas, was
pellant, and Frederick W. Wade was appellee, as full, t
and complete as the originals of the same remain on
and of record in my office.

In Testimony Whereof, I hereunto subscribe my na
and affix the seal of the United States Court of Appe
for the Tenth Circuit, at my office in Denver, Colorado,
27th day of October, A. D. 1948.

(Seal, U. S. Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Co
of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 10, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(790)